

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 10, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from United States District Court, Southern District of New York	1	1
Docket entries	1	1
Complaint	2	2
Exhibit—Public voucher dated March 25, 1942	6	4
Exhibit—Public voucher dated March 19, 1942	8	4
Answer	10	5
Reply	17	9
Statement of evidence	18	10
Plaintiff's case	18	10
Testimony of William T. Cole	18	10
Motion to dismiss	33	21
Defendant's case	33	21
Findings of fact, conclusions of law and opinion, Leibell, J.	36	23
Judgment	56	37
Notice of appeal	57	37
Stipulation as to exhibits	58	38
Stipulation as to record	60	39
Clerk's certificate (omitted in printing)	61	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 17, 1949.

	Original	Print
Proceedings in U.S.C.A., Second Circuit	62	39
Opinion, L. Hand, J.	62	40
Dissenting opinion, A. N. Hand, J.	68	43
Judgment	72	46
Petition for rehearing	74	47
Denial of petition for rehearing	82	52
Order on petition for rehearing	83	52
Clerk's certificate (omitted in printing)	85	
Order allowing certiorari	86	53

EXHIBITS

Plaintiff's exhibits:

1—Return of Comptroller General	1	53
2—Letter dated December 18, 1944	4	55
3—Plaintiff's letter of February 16, 1945	6	56
4—Plaintiff's letter of January 9, 1946	15	62
5—Plaintiff's letter of January 9, 1946	16	63
6—Advice of payment of settlement dated February 2, 1946	17	64
7—Memorandum accompanying check	20	66
8—Notice from the Comptroller General	21	67
9—Shipping Order	23	68
10—Bill of lading	24	69
11—Bill of lading	28	72

Defendant's exhibits:

"A"—Affidavit of Willis H. Swartout	30	73
"B"—Public voucher	33	74
Clerk's certificate	34	75

[fol. 1]

**IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK.**

DOCKET ENTRIES

July 19, 1946—Filed complaint and issued summons.

July 24, 1946—Filed summons and return. Served Mary Cassidy of United States Attorney's Office, Southern District of New York on July 19, 1946.

Served Attorney General by registered mail on July 19, 1946.

January 13, 1947—Filed answer of defendant.

February 10, 1947—Filed reply to counterclaim of defendant's answer.

April 2, 1948—Trial begun and concluded before Leibell, J. (April 15, 1948 for reply briefs and criticisms of opponent's findings)

April 29, 1948—Filed transcript of record of proceeding April 2, 1948.

May 3, 1948—Filed findings of fact and conclusions of law and opinion No. 17451 granting plaintiff judgment on the merits. Leibell, J.

May 14, 1948—Filed judgment No. 49289 in favor of plaintiff against defendant for \$3,520.52 and dismissing setoff and counterclaim of \$3,520.52 of defendant. Leibell, J.

July 12, 1948—Filed notice of appeal by defendant. Mailed copy to Wood, Molloy, France & Tully on July 13, 1948.

[fol. 2]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil 37-41

ALCOA STEAMSHIP COMPANY, INC., Plaintiff,
against

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT

The plaintiff by its attorneys, Wood, Molloy, France & Tally, for its complaint against the defendant, alleges as follows:

First: That at all the times hereinafter mentioned, the plaintiff was and still is a citizen of the United States and a corporation, duly organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at No. 17 Battery Place, Borough of Manhattan, City and State of New York, within the Southern District of New York. This action is brought under paragraph 20 of Section 24 of the Act of March 3, 1911, 36 Stat. 1093 (28 United States Code, Section 41 (20)). The plaintiff's claim does not exceed \$10,000 and is founded upon a contract, express or implied, with the Government of the United States, as hereinafter more expressly appears.

Second: That heretofore the plaintiff carried on its vessels at the request of and for the defendant certain consignments of lumber as follows:

[fol. 3] 1. On the SS. PLOW CITY, in and about January, 1942, from St. Joe, Florida, to Port of Spain, Trinidad, B. W. I., 1,150,768 feet of lumber.

2. On the SS. ALCOA TRADER, in and about November, 1941, from Tampa, Florida, to Port of Spain, Trinidad, B. W. I., 837,113 feet of lumber.

That the said shipments were duly delivered to the defendant at Port of Spain, Trinidad, B. W. I.

That the freight charge for the foregoing shipments, computed in accordance with the prevailing conference tariff rate, was in the case of the shipment on the SS. PLOW

CITY \$24,453.83 and in the case of the shipment on the SS. ALCOA TRADER \$17,788.65.

Third: That the said amounts were billed by the plaintiff to the defendant (represented by the War Department, Finance Officer, U. S. Army, Washington, D. C.) on the prescribed "Public Voucher for Transportation of Freight or Express", and thereafter the said sums, to wit, \$24,453.83 on or about March 25th, 1942, and \$17,788.65 on or about March 19th, 1942, were paid by the defendant to the plaintiff. That copies of the said Public Vouchers and the memorandum accompanying the checks in payment of the said sums of \$24,453.83 and \$17,788.65 are attached hereto and marked Exhibits 1a, 1b, 2a, and 2b, and made a part hereof.

Fourth: That thereafter the plaintiff presented to the defendant another bill for freight, for cargo carried by the plaintiff for the defendant from New York to Port of Spain, Trinidad, in the amount of \$23,137.79. That the Comptroller General of the United States reviewed the bill and allowed the same except for a disallowance of \$358.35, but deducted therefrom, among other similar deductions, the sum of \$4,890.77, which he claimed was an overpayment of the freight monies on the shipment on the SS. PLOW CITY, set forth in paragraphs Second and Third hereof, and the sum of \$3,557.73, which he claimed was an overpayment of the freight monies on the shipment on the SS. ALCOA TRADER, set forth in paragraphs Second and Third hereof. That said action was taken by the Comptroller General on or about January 11, 1945.

Fifth: That the basis of the claim of over-payment made by the Comptroller General as set forth in paragraph Fourth hereof, was that the prevailing freight tariff did not permit a surcharge of 25% which had been incorporated in the freight bills set forth in paragraphs Second and Third hereof. However, the Comptroller General stated that his office would give consideration to any material evidence which the plaintiff might offer to sustain the validity of the said surcharge which the Comptroller General had deducted as aforesaid.

Sixth: That thereafter the plaintiff did submit such evidence and support for the validity of its right to the said surcharge and on and about August 29th, 1945, the plain-

tiff was advised that the Comptroller General had reconsidered his decision as to the invalidity of the said surcharge of 25% and that the amounts of \$3,557.73 and \$4,890.77 theretofore deducted as set forth in paragraph Fourth hereof would be repaid to the plaintiff upon presentation of an appropriate claim.

Seventh: That thereafter and in or about January 9, 1946, the plaintiff did file in appropriate form its claims [fol. 5] for refunds of the said sums of \$3,557.73 and \$4,890.88, deducted as set forth in paragraph Fourth hereof, and on February 2nd, 1946, the Comptroller General certified in writing that the said sums of \$3,557.73 and \$4,890.77, making a total of \$8,448.50, were due to the plaintiff.

Eighth: That the Comptroller General, however, improperly and unlawfully deducted \$3,520.52 from the said total amount of \$8,448.50, certified and acknowledged by the defendant to be due to the plaintiff, and remitted to the plaintiff only such difference, to wit, \$4,927.98.

Ninth: That there remains due and owing to the plaintiff from the defendant the sum of \$3,520.52, being the difference between the total sum of \$8,448.52, which the Comptroller General on February 2, 1946 found and certified to be due and owing to the plaintiff, and the sum paid, \$4,927.98, no part of which difference has been paid to the plaintiff, although duly demanded by the plaintiff and refused by the defendant.

Wherefore, plaintiff demands judgment in the sum of \$3,520.52, with costs.

Wood, Molloy, Francé & Tully, Attorneys for Plaintiff, Office & Post Office Address, 25 Broad Street, Borough of Manhattan, New York 4, N. Y.

(Verified by Robert D. Weeks, Treasurer, Alcoa Steamship Company, Inc. on July 17, 1946.)

(Here follow 2 Photolithographs, side folios 6-7, 8-9)

EXHIBIT ANNEXED TO COMPLAINT

The enclosed check, No. 245747, with the voucher submitted for payment of the account described in the memorandum hereon.

(The acknowledgment of receipt of checks is important)

Name: Alcoa Steamship Company, Inc.
 Address: 17 Battery Place
New York, N. Y.

RECEIVED

It is requested that the amount in the attached statement be paid to the undersigned as soon as possible. The check should be payable to the undersigned or to the order of the undersigned. The check should be made payable to the order of the undersigned or to the order of the undersigned. The check should be made payable to the order of the undersigned or to the order of the undersigned.

Very respectfully,
J. Edgar Hoover, Director
U. S. Department of Justice, Washington, D. C.

Bill No. C-534 (R-3901)
 Amount, \$17788.65
 Cont. 3/10 WP-231284
 Due 3/1 T-200
39 Flood Trader, Wyo. 10

Standard Form No. 1000
Form approved by
Comptroller General U. S.
June 25, 1951

~~The writer~~ ~~on behalf of President & International Government, and~~

Public Voucher for Transportation of Freight or Express

This number consists of _____ sheets

(Statement of consent must be completely filled in by the donor prior to signature, and there must not be any erasures or alterations unless initialed or signed)

U.S. War Department, Finance Officer, U.S. Army,
Washington, D. C. (Department, Bureau, or Headquarters)

Abstract

RESEARCH DESIGN

████████████████████

END

Form of Paper Used

THE UNITED STATES, DR.

TO Jason Leaship Company, Inc.

Address 17 Battery Place, New York, N.Y.

[illegible][illegible]

Total	317700	69
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MEMORANDUM

MEMORANDUM

Chief Billing Clerk

(Additional statements by Department, Bureau,
or Establishment, if desired necessary)

Pages must NOT use this space

Discrepancy:

Account verified; correct for.....0

(Signature or Initials)

MEMORANDUM

Paid by Check No

dated

19 for 3

no Treasurer of the United States
in favor of payee named above.

[fol. 10]

IN UNITED STATES DISTRICT COURT

ANSWER

Defendant, answering the complaint herein, alleges upon information and belief as follows:

First: Denies that it has any knowledge or information sufficient to form a belief as to Plaintiff's citizenship or residence, corporate status and office address. Admits that Plaintiff's alleged claim is purportedly founded on a certain contract or contracts and that the amount mentioned in the complaint does not exceed \$10,000.00. Denies the truth of the other allegations contained in the First paragraph.

Second: Admits that the shipments referred to in the Second paragraph of the complaint were transported by Plaintiff on the SS PLOW CITY and SS ALCOA TRADER, respectively, that said shipments were delivered to defendant or its order at destination and that the freights specified in the respective bills of lading were \$24,453.83 and \$17,788.65. Denies the truth of the other allegations contained in the Second paragraph.

Third: Admits that the said freights were billed by Plaintiff to Defendant and were paid in full by Defendant to Plaintiff at or about the times referred to in the complaint. Admits further that the photostats annexed to the complaint and marked exhibits 1a, 1b, 2a and 2b are true copies of the public vouchers and memoranda accompanying the checks in connection with the said billings and payments.

[fol. 11] Fourth: Admits that thereafter the total sum of \$8,448.50 was withheld or deducted from a bill or bills presented by Plaintiff to Defendant on the grounds that the payments referred to in the preceding paragraph of this answer were an overpayment of freight in that amount. Denies that it has any present knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Fourth paragraph.

Fifth: Except to the extent hereinafter indicated, it denies that it has any present knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Fifth paragraph.

Sixth: Denies that the advices, if any, of the Comptroller General were that the said total sum of \$8,448.50 would be repaid to Plaintiff and alleges that said advices, if any, were that the said sums would be repaid only in the event there were no other overpayments, erroneous payments, or illegal or unauthorized payments by Defendant to Plaintiff and only in the event that there were no other sums due Defendant from Plaintiff, by virtue of any demands, offsets, or counterclaims in favor of Defendant and against Plaintiff or otherwise. Except to the extent indicated, it denies that it has any present knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Sixth paragraph.

Seventh: Admits that on or about January 9, 1946, Plaintiff addressed a certain letter or letters and forms to Defendant in connection with a claim for the payment of the said total sum of \$8,448.50. Denies that the Comptroller General's certification, if any, was that the said total amount [fol. 12] was due Plaintiff and alleges that the said certification, if any, was that such amount was due Plaintiff only in the event that there were no other overpayments, erroneous payments or illegal or unauthorized payments by Defendant to Plaintiff and only in the event there were no other sums due and owing to Defendant from Plaintiff by reason of any claims, demands, offsets, or counterclaims in favor of Defendant and against Plaintiff or otherwise. Except to the extent indicated, it denies it has any present knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Seventh paragraph.

Eighth: Admits that the sum of \$3,520.52 was deducted from the said total sum of \$8,448.50, that the said sum of \$3,520.52 was not paid, and that the balance or \$4,927.98 was paid by Defendant to Plaintiff. Denies the truth of the other allegations contained in the Eighth paragraph.

Ninth: Admits that sum of money has been demanded and not paid. Denies the truth of the other allegations contained in the Ninth paragraph.

For a Separate and Complete Defense

Tenth: Alleges that at and during all the times referred to in the complaint Defendant was and still is a Sovereign.

Eleventh: Alleges that the sum of \$3,520.52 referred to in the complaint represents ocean freight claimed to be due Plaintiff from Defendant for the ocean transportation of a shipment or shipments of cargo owned or possessed by the United States on an ocean going vessel or vessels owned or operated by Plaintiff pursuant to a written contract [fol. 13] tract or contracts of carriage, commonly known as a bill or bills of lading, the said contract or contracts being maritime and accordingly Plaintiff's remedy, if any, is exclusively pursuant to the Act of March 9, 1920, 41 Stat. 525, commonly known as the Suits in Admiralty Act (46 USC 741-752), which said Act repeals the Tucker Act (28 USC 41 (20)) referred to in the First paragraph of the complaint in so far as causes of action within the jurisdiction of courts of admiralty are concerned, and accordingly Defendant has not consented to be sued in the cause of action purportedly set forth in the complaint, this Court is without jurisdiction over the subject matter of the cause of action alleged in the complaint and over the person of Defendant, and the complaint should be dismissed.

For a Separate and Complete Defense

Twelfth: Repeats and realleges all the allegations contained in the Tenth and Eleventh paragraphs of this answer with the same force and effect as if herein set forth at length.

Thirteenth: Alleges that Section 5 of the said Suits in Admiralty Act (46 USC 745) provides that suits under that Act must be commenced within two years after the cause of action arises.

Fourteenth: Alleges that suit herein was not commenced as provided in the said Suits in Admiralty Act and accordingly, even if this Court shall have jurisdiction over the cause of action and over the person of Defendant by reason of the matters alleged in the complaint, which jurisdiction Defendant denies, suit herein is barred and the complaint should be dismissed.

[fol. 14] As a Further Set-Off, Counterclaim and Complete Defense

Fifteenth: Alleges that on or about June 13, 1942, at Mobile, Alabama, Defendant, through the War Department,

through its District Engineer, Mobile District, delivered a shipment totaling 28,896 pieces of dressed yellow pine in good order and condition to Plaintiff and to the SS GUNVOR, which said shipment Plaintiff and the SS GUNVOR received and accepted and agreed to transport on the SS GUNVOR from the Port of Mobile to the Port of Port of Spain, Trinidad, there to be delivered in the same good order and condition as when received, to Defendant, through the District Engineer, United States Engineer's Office, Port of Spain, Trinidad, pursuant to all the terms and conditions contained in a certain contract of carriage evidenced by Government bill of lading, standard form 1058 No. WE 310320, then and there issued and signed by or on behalf of Plaintiff by a duly authorized agent of the Plaintiff.

Sixteenth: Alleges that the said bill of lading contains, among others, the following terms and conditions:

"Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same [fol. 15] rates and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

"• • • The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made."

Seventeenth: Alleges that the said shipment was never delivered by Plaintiff to Defendant at the Port of Spain, Trinidad, or at any other place, that on information and belief the said shipment was lost at sea during transit, that Defendant and/or the consignee did not sign the said bill of lading and that Plaintiff did not present the said bill of lading properly accomplished to Defendant as pro-

vided in the above quoted provisions of the said contract of carriage.

Eighteenth: Alleges that thereafter and on or about September 25, 1942, freight on the said shipment in the sum of \$3,520.52 was paid by Defendant to Plaintiff.

Nineteenth: Alleges that the said payment of \$3,520.52 was erroneous, was made under a mistake of law and/or of fact, was contrary to the above quoted provisions of the said bill of lading, was unauthorized, was illegal and was contrary to law.

Twentieth: Alleges that by reason of the premises, at and during the times referred to in the complaint, and particularly in the Fifth, Sixth, Seventh, Eighth and Ninth [fol. 16] paragraphs of the complaint, there was due and owing from Plaintiff to Defendant the sum of \$3,520.52.

Twenty-first: Alleges that by reason of the premises the withholding or deduction of \$3,520.52, referred to in the complaint, was proper and lawful and the complaint herein to recover the said deduction should be dismissed.

Wherefore, Defendant prays that the complaint herein be dismissed with costs and that it may have such other and further relief as may be just in the premises.

John F. X. McGohey, United States Attorney, Attorney for Defendant, Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

(Signed on behalf of John F. X. McGohey, United States Attorney and filed January 13, 1947.)

[fol. 17] IN UNITED STATES DISTRICT COURT

REPLY

The plaintiff by its attorneys, Wood, Molloy, France & Tully, for its reply to the counterclaim contained in the defendant's answer herein, alleges as follows:

First: The plaintiff admits that the said shipment was never delivered by plaintiff to defendant at the Port of Spain, Trinidad, or at any other place, and that the said

shipment was lost at sea during transit. The plaintiff denies each and every other allegation contained in the Seventeenth paragraph of the answer.

Second: The plaintiff denies each and every allegation contained in paragraphs of the answer designated "Nineteenth", "Twentieth" and "Twenty-first".

Wherefore plaintiff demands judgment dismissing the counterclaim of the defendant, with costs, and demands judgment as demanded in the complaint.

Wood, Molloy, France & Tully, Attorneys for Plaintiff, Office & Post Office Address, No. 25 Broad Street, New York 4, N. Y.

(Verified by Robert D. Weeks, Treasurer, Alcoa Steamship Company, Inc. on February 7, 1947.)

[fol. 18] IN UNITED STATES DISTRICT COURT

Statement of Evidence

PLAINTIFF'S CASE

WILLIAM T. COLE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. France:

Q. Mr. Cole, what position do you have with the Alcoa Steamship Company?

A. Auditor and assistant secretary.

Q. How long have you been with that company?

A. I have been with the Aluminum Company of America approximately 30 years and the steamship end of it about 20 years.

Q. The Aluminum Steamship Company, or the Alcoa Steamship Company is a New York corporation?

A. That is right.

Q. And its principal office is where?

A. New York.

Q. How long have you held your present position as auditor?

A. Oh, approximately 20 years.

Q. Mr. Cole, you have seen the complaint in this action?

A. Yes.

Q. And there are certain exhibits that are attached to it that were admitted in the answer. They were payments by the United States, through the War Department; of certain freight charges which were allegedly earned by you on the steamships Plow City and the Alcoa Trader. I just show you the originals (handing). You are familiar with them?

A. That is right.

Q. Later than those documents, was there a claim filed by you for freight transported by vessels, or a vessel, of [fol. 19] the Alcoa Steamship Company from New York Port of Spain?

Mr. France: I want to identify the claim at the top (handing to witness).

A. That is right.

Q. At the presentation of that claim and the consideration by the Comptroller-General did you receive this document?

A. Yes, sir.

Mr. France: Mr. Postner, I suppose you are familiar with that (handing).

I offer it in evidence.

The Court: What is it, counselor? Describe it on the record.

Mr. France: It is a return of the Comptroller-General to the claim which the witness has just referred to, in which there is deducted the two amounts which are shown in the exhibits attached to the complaint, on the ground that there had been an excess charge. In the parts that I would like particularly to call to the attention of the Court, and which are the only parts that are relevant in this case, are the items that are marked off with a check and a red circle, on pages 5 and 6. They show the deduction of the sums—or 25 per cent of the sums which had been paid to Alcoa Steamship on the prior shipments, on the ground that 25 per cent surcharge of freight was not warranted.

(Marked Plaintiff's Exhibit 1.)

[fol. 20] Mr. Postner: Just to straighten this out, could I ask the witness to identify those ships or shipments that these deductions were made against?

The Court: Which vessels?

Mr. Postner: Yes. It now appears that the deductions were made later. I don't think that changes the principle.

Mr. France: I think I can straighten that out.

The Court: Well, we will see what it is. These deductions were made against the two ships that you referred to there, the Plow City and the Trader?

Mr. France: Yes.

By Mr. France:

Q. Did Alcoa, through you, enter a protest against these items of 25 per cent surcharge which were claimed to be improper?

A. We did.

Q. I show you a letter from the General Accounting Office, and ask you whether that letter was in response to your letter of protest (handing to witness)?

A. That is right.

Mr. Postner: No objection.

The Clerk: The first document is marked Plaintiff's Exhibit 1.

The Court: What was the date of that?

The Clerk: I believe that was January 11, 1945.

Mr. France: That is correct.

The Court: All right. Now the government's letter is what date?

The Clerk: December 18, 1944, referring to Exhibit 2.

(Marked Plaintiff's Exhibit 2.)

[fol. 21] Q. Now in response to that letter, which in its last paragraph said you might submit which you wished to, did you submit a letter to the Comptroller-General on this subject of the 25 per cent surcharge which had been made?

A. Yes, sir.

Mr. Postner: Is this the letter?

Mr. France: This is a copy of the letter.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 3.)

The Court: What is the date?

The Clerk: Dated February 16, 1945.

The Court: Is it in the form of a letter?

Mr. France: Yes, it is in the form of a letter from Alcoa to the Comptroller-General.

Q. Subsequent to that letter, and in the month of August of 1945, were you at the office of the Comptroller-General?

A. (Nodding) One of the branches.

Q. Did you receive any word at that time that you might submit claims for these deductions which had been made?

A. Yes, sir.

Mr. Postner: I object to that, your Honor - the form of the question.

The Court: Overruled.

Q. I show you a letter dated January 9th, and ask you whether that is a copy of a claim for refund which you made after that direction (handing paper to witness)?

A. Yes, sir, it is.

[fol. 22] Mr. France: I offer it in evidence.

(Marked Plaintiff's Exhibit 4.)

The Court: Date?

The Clerk: Dated January 9, 1946.

Q. I show you a copy of another letter, the same date, January 9, 1946, which you sent to the Comptroller as a claim for refund?

A. Yes.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 5.)

The Court: Are these separate sums? Different sums?

Mr. France: They are different sums. They go back to the original sums which were deducted.

The Court: Yes, one under the Plow City and the other under the Trader.

Mr. France: Yes, correct.

Q. Did you receive a reply and advice from the Comptroller-General in reply to the claims which have just been offered in evidence as Plaintiff's Exhibits 4 and 5?

A. Correct.

Q. Is this document it?

A. That is right.

Mr. Postner: I have no objection to the method of proof.

(Marked Plaintiff's Exhibit 6.)

[fol. 23] Mr. Postner: There is no objection to the proof of that document, your Honor, but I have, or may have, one objection to a possible interpretation of it, particularly the words "There is due you"—so much of it. If it means the full amount less the deduction there would be no objection.

The Court: I would have to see the document, wouldn't I, in order to interpret it?

Mr. Postner: Yes, your Honor.

The Court: Well, I think it is pretty clear what they are doing. The government says, "Now here: In respect to your claim for the sum of \$3557.73, which is on the Alcoa Trader, and your claim for \$4890.77 which is on the Plow City, those claims are allowed, but we make therefrom a deduction. We overpaid freight to the extent of \$3,520.52 in connection with a shipment on the s.s. Gunvor, lost through enemy action, and we are deducting that amount, the \$3520.52."

Now apparently they deducted it from the \$4890.77, the claim asserted by Alcoa in connection with the Plow City.

Mr. Postner: If that is clear I withdraw the objection. I just didn't want—let me put it this way: We first started and we made a deduction for incorrect reason, and then—

The Court: I think I understand it, counselor. The company billed you a certain amount of freight on the Plow City and a certain amount of freight on the Alcoa Trader, and the bill in each instance contained a plus 25 per cent—

Mr. Postner: That is right.

[fol. 24] The Court: That 25 per cent in the case of the Plow City amounted to \$4,890.77, and in the case of the Alcoa Trader to \$3,557.73. The Comptroller-General disallowed the claim of that 25 per cent. Later on there were communications between the parties, and he permitted them to submit additional proof, they claiming a refund of those two sums, and then he recognized that they were right, that he should not have deducted the 25 per cent on the freight of those two shipments, and so he reversed himself on that and allowed their claims for those two sums. But

he said, "We find, in going over our records, that we paid you freight on another shipment which was lost through enemy action, and you were not entitled to any freight."

I assume from reading your briefs that that was because the shipment was not delivered at its destination.

Mr. Postner: That is the situation. That is the one thing I wanted to be cleared up.

The Court: Yes, but according to the document marked Plaintiff's Exhibit 6 the deduction of the \$3,520.52—they deducted that from the bill of \$4,890—the claim for refund of \$4,890.77 is in connection with the Plow City shipment.

All right, what else have you?

Mr. France: I think, even though it may seem part of defendant's case, I would like to put in some proof on this Gunvor—my theory of how it arose.

The Court: Go ahead.

[fol. 25] By Mr. France:

Q. On the freight which was shipped on the s.s. Gunvor, is this a memorandum which accompanied the check of payment which came from the War Department (handing)?

A. Correct.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 7.)

Q. I show you a paper from the General Accounting Office, and ask you whether that was received by you on about the date that is stamped there?

A. It was.

The Court: Did you mark that exhibit, Mr. Clerk?

The Clerk: Are you talking about the memorandum, your Honor?

The Court: Yes.

The Clerk: Yes, I marked that Exhibit 7.

Mr. France: I offer it in evidence, and there is no objection.

Mr. Postner: No objection.

Mr. France: Would you like it described a bit, sir? This is a notice from the General Accounting Office that the \$3,520 which was paid for freight on the Gunvor was regarded as an overpayment and the authority for it is written here, but it is just a notice.

The Court: What is the date of it, counselor?

Mr. France: July 24, 1944. J

(Marked Plaintiff's Exhibit 8.)

[fol. 26] Q. I show you a shipping order received from the War Department, for shipment of goods which was shipped on the Gunvor. Is that the original order?

A. That is right.

Q. And let me ask you this: You are familiar with the government's bill of lading?

A. Yes, sir.

Q. Are the terms on the back of that order the terms of the government bill of lading?

A. Yes, sir.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 9.)

Q. I show you a blank form of bill of lading of the Alcoa Steamship Company. Will you state whether or not that was the form or bill of lading used by the Alcoa at the time of the Gunvor shipment (handing)?

A. That is right.

Mr. Postner: I have no objection to this one, your Honor, provided we can't find the actual carrier's bill of lading. I have a reference to it in some of my documents that I will ask the witness about.

The Court: Well, where is the actual carrier's bill of lading?

Mr. Postner: I don't know, your Honor, but I may be able to bring it out in cross-examination on this voucher submitted for this Gunvor freight by Alcoa. There is a reference to carrier bill of lading M2209. I think M2209 is the best evidence, but if that can't be located I have no objection to the regular form bill of lading.

The Court: What is this reference to this Exhibit 9?

The Witness: That is practically a copy of the government bill of lading.

[fol. 27] Mr. France: That is the order?

The Witness: That is the order to ship the goods.

Q. It is an order from the disbursing agent of the United States Government?

The Court: Who issued the bills of lading? Did the government issue them or the company?

The Witness: The government.

The Court: On any of their shipments?

The Witness: That is right. There is a white bill of lading attached to this, and then there is a salmon-colored one, and I think there is some other memorandum copies, and the white bill of lading which is issued to you is signed by the government officer shipping the goods.

The Court: Where was that in this case, in connection with the Gunvor?

Mr. Postner: I have a certified photostatic copy of it, your Honor.

The Court: Show it to the witness.

(Mr. Postner hands photostats to the witness.)

Mr. Postner: This is put together so I can't take them apart, but it is the third and fourth pages there.

The Witness: That is right.

The Court: Now are we marking this blank bill of lading Exhibit 10—the blank form used by Alcoa?

Mr. Postner: That is all right.

The Court: Now was there any such bill of lading issued in connection with this shipment?

[fol. 28] Mr. France: Like that? No, sir, because it is incorporated by the terms of the government bill of lading.

The Court: Oh, I see.

(Marked Plaintiff's Exhibit 10.)

The Court: Have you that white bill of lading now?

Mr. Postner: No, your Honor, we do not have the white one. I just have a certified copy of it.

The Court: Well, all right.

Mr. France: That is all right, I have no objection to it.

Mr. Postner: I have a certified copy right here.

The Court: You may show it to the witness, and if the plaintiff wishes it he may do so.

Mr. Postner: I just showed it to the witness and he is certain it is a copy.

The Court: Now what would you call this paper that the witness has just looked at?

Mr. France: That is a certified copy of the original bill of lading. Am I correct?

Mr. Postner: Correct.

The Court: The so-called white bill of lading.

Mr. France: The so-called white bill of lading, yes. Seeing it is here I am glad to offer it in evidence.

The Court: All right.

Mr. Postner: There is a little practical difficulty here, your Honor. There are several papers all in one certificate.

The Court: All right, we will mark that one.

[fol. 29] Mr. Postner: He may not wish to put all of them in.

The Court: I understand. That one will be marked Exhibit 11.

Mr. Postner: It is the third and fourth pages there.

(Marked Plaintiff's Exhibit 11.)

By Mr. France:

Q. The Gunvor was torpedoed and lost by enemy action, was it not?

A. Yes.

Mr. France: That is my case.

The Court: Well, what do you call this paper that has been marked Exhibit 11? It is one sheet, isn't it?

Mr. Postner: It should be two sheets. It is photostated so that the conditions that appear on the reverse appear on a separate photostat.

The Court: The clerk has marked only one sheet. Won't you tell him which is which?

Mr. Postner: The third and fourth.

(Discussion off the record.)

The Court: You better have them identified. I want to have this second sheet marked as part of Exhibit 11.

The Clerk: This fourth sheet is part of Exhibit 11.

[fol. 30] Mr. Postner: (After examining photostats) I am sorry, they printed them both on one side, so it is really only one sheet. I am sorry.

The Court: Then he marked the wrong sheet.

(Fourth sheet only one marked Exhibit 11.)

The Court: Well, that is the government's bill of lading?

Mr. France: Yes, your Honor.

The Court: All right, counselor. That is dated June 13th, isn't it, 1942?

Mr. France: Yes, sir.

The Court: This other paper you marked as Exhibit 11 was not the correct one. I am referring to a paper dated August 15, 1942.

Mr. France: If your Honor please, that is the plaintiff's case.

Cross-examination.

By Mr. Postner:

Q. Are you familiar with the public vouchers that are presented to collect freight? Will you look at the first two pages on this handwriting)?

A. (No answer.)

Q. Isn't that a copy of the public voucher that was put in by Alcoa or by us in order to collect the \$6,520.52 for the Gunvor freight?

A. Correct.

The Court: What is the date?

Mr. Postner: There is a stamp date, August 16, 1942. The date that this was presented.

Q. Is this the date that it was presented?

A. Yes, I guess so.

[fol. 31] Mr. Postner: It was presented either August 14th or August 16th, your Honor.

The Court: All right.

Mr. Postner: 1942.

The Court: Now how many sheets are there?

Mr. Postner: There are two.

The Court: The clerk will mark them. Are you offering them as an exhibit?

Mr. Postner: Yes.

Mr. France: Does that include the affidavit of Mr. Swartout?

Mr. Postner: Yes.

The Court: The affidavit is part of the voucher, or is it a separate document?

The Witness: It is a separate document.

The Court: Then the voucher will be marked A, and the affidavit B. Whose affidavit was it?

Mr. France: Willis H. Swartout.

Q. That affidavit was attached to the voucher when it was sent, was it not?

A. As far-as I remember it was.

The Court: Who is Mr. Swartout?

The Witness: He is an employee of Alcoa Steamship Company.

May I see that again, please?

(Marked Defendant's Exhibits A and B.)

Q. On the affidavit, Defendant's Exhibit B, there is a reference to the government bill of lading number, which is Plaintiff's Exhibit 11, I believe; is that correct?

A. Well, I would have to see that.

[fol. 32] Q. It is in there. It is the next page.

A. That is correct.

Q. Now will you also look at the second entry on the affidavit of Mr. Swartout, Defendant's Exhibit B, and will you read that?

A. That is the original bill of lading covering this (indicating).

Q. No, I am sorry (indicating).

A. Carrier's bill of lading M2209.

Q. Now what does that reference mean?

A. Well, it means, if I recollect back to 1942, we also made for our own purposes our own commercial bill of lading on these shipments. We had a series of numbering bills of lading, and that would be our series of numbering bills of lading.

Q. And whether you issued it or not, you at least prepared one?

A. That is right.

Q. Is it possible to get that bill of lading?

A. That I don't know.

Q. Will you tell me whether this blank form of bill of lading, Plaintiff's Exhibit 10, would be the form of bill of lading used and referred to in the affidavit?

A. Yes, because this was printed in December, 1941, and this shipment was in June, 1942.

Mr. Postner: There is no objection now to this blank form, and that is the end of my cross examination.

The Court: Well, it is in. It has been marked Plaintiff's Exhibit 10.

Is that your case?

Mr. France: Yes.

The Court: Plaintiff rests?

Mr. France: Yes.

[fol. 33]

MOTION TO DISMISS

Mr. Postner: At this time I would like to move only on the jurisdictional ground. As I pointed out in my brief, there is a case by Judge Hulbert against me, and since then I have made a search and I find it is sufficiently reported in the Advance Sheets.

The Court: I am going to reserve decision on the question of jurisdiction until I have time to look into it. So as far as that motion is concerned decision reserved. What is the citation?

Mr. Postner: 75 Fed. Supp. 110. In my brief I gave you the American Maritime cases.

The Court: All right. Now the defendant's proof.

DEFENDANT'S CASE

Mr. Postner: My case is all documents, and the plaintiff has introduced them all.

The Court: Anything you wish to add? If there are any you may offer them now.

Mr. Postner: I am just about to rest, with one little document here, and that is certified, but I don't know whether it is evidence or not. I found it very helpful.

The Court: If it is duly certified and it relates to this matter show it to your opponent.

Mr. Postner: You can see that in one page is related what took place here. It is called a statement of settlement of claim issued by the Comptroller-General, and it will show on that one page what took several paragraphs—

The Court: All right, show it to your opponent. You offer it in evidence?

Mr. Postner: If there is no objection.

The Court: Prepared in the Comptroller-General's office.

[fol. 34] Mr. Postner: The original was, yes.

The Court: What is the date of it?

Mr. Postner: February 2, 1946.

Mr. France: Well, it goes before you. It might be a little different under ordinary circumstances. This is behind the scenes—this shows what was going through the Comptroller-

General's mind and not what he submitted to us, but for what it is worth—

The Court: All right, it is received.

(Marked Defendant's Exhibit C.)

The Court: All right. That is, really dated January 30, 1946, isn't it? This paper?

Mr. Postner: There is a stamped date on the front of it, February 2, 1946. That is the one I took. Very faintly, up in one of these little boxes.

The Court: All right. Exhibit C. What else?

Mr. Postner: Now, your Honor, the testimony shows that the Gunvor shipment was made, Mr. Cole testified that the vessel was sunk—

The Court: By enemy action.

Mr. Postner: —by enemy action, and that is admitted in the reply anyway. I might make it plain we are not suing for the loss of the cargo; it is only the freight that we paid. The freight is shown by this voucher which has been put in evidence as Defendant's Exhibit A. I believe whether that payment was erroneous or illegal and binding on the government are questions of law for your Honor, so the defendant rests.

The Court: Any rebuttal?

[fol. 35] Mr. France: No, sir, but I would like a little while to reply to the brief that Mr. Postner has given me.

The Court: Have you exchanged your briefs?

Mr. France: Yes, sir, we have.

The Court: The main briefs have been exchanged. Now how much time do you need?

Mr. France: About a week or ten days.

The Court: All right, April 12th, ten days.

Now here is what I want you to do: on April 12th you will exchange answering briefs and serve ~~proposed~~ findings of fact and conclusions of law. Now I will give you three days after that, to April 15th, for reply briefs and any criticism of your opponent's proposed findings of fact and conclusions of law.

All right. Decision reserved.

[fol. 36]

In United States District Court**FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION**

This cause having been tried on April 2, 1948, and the Court having heard the evidence and arguments of counsel and considered their briefs, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff at all the times herein referred to was a corporation duly organized and existing under the laws of the State of New York, with its office at No. 17 Battery Place, Borough of Manhattan, City and State of New York. The defendant is a sovereign.

2. The plaintiff carried on its vessels at the request of and for the defendant certain consignments of lumber as follows:

1. On the SS. Plow City, in and about January 1942, from St. Joe, Florida, to Port of Spain, Trinidad, B. W. I., 1,150,768 feet of lumber.

2. On the SS. Alcoa Trader, in and about November, 1941, from Tampa, Florida, to Port of Spain, Trinidad, B. W. I., 87,113 feet of lumber.

The said shipments were duly delivered to the defendant at Port of Spain, Trinidad, B. W. I.

The freight charge for the foregoing shipments was \$24,453.83 for the shipment on the SS. Plow City, and \$17,788.65 for the shipment on the SS. Alcoa Trader.

[fol. 37] 3. Those amounts were billed by the plaintiff to the defendant (represented by the War Department, Finance Officer, U. S. Army, Washington, D. C.) on the prescribed "Public Voucher for Transportation of Freight or Express," and thereafter the said sums were paid by the defendant to the plaintiff; \$24,453.83 on or about March 25th, 1942, and \$17,788.65 on or about March 19th, 1942. (Exhibits annexed to complaint.)

4. Thereafter the plaintiff presented to the defendant a bill for freight, for cargo, other than the foregoing, carried by the plaintiff from New York to Port of Spain, Trinidad, in the amount of \$23,137.79. On the 11th day of

January, 1945, the Comptroller General of the United States allowed \$22,779.44 of said sums, and then deducted from said allowance of \$22,779.44 (1) an item of \$4,890.77, claimed to be an overpayment in that amount of the freight theretofore and on or about March 25th, 1942, paid to the plaintiff for the aforesaid shipment of cargo on the SS. Plow City and (2) an item of \$3,557.73, claimed to be an overpayment in that amount of the freight theretofore and on or about March 19th, 1942, paid to the plaintiff for the aforesaid shipment of cargo on the SS. Alcoa Trader. (Ex. 1.)

5. The basis of the foregoing deduction for overpayment made by the Comptroller General was that the prevailing tariff did not permit a surcharge of 25%, which had been incorporated in the aforesaid freight bills for cargo carried on the SS. Plow City and SS. Alcoa Trader, respectively.

6. On December 18, 1944, the General Accounting Office notified plaintiff (Ex. 2) that it would give consideration to any material evidence which the plaintiff might offer to sustain the validity of the said surcharge of 25%.

[fol. 38] 7. On February 16, 1945, the plaintiff did submit such evidence and support for the validity of the 25% surcharge (Ex. 3) and thereafter in August, 1945, the Comptroller General indicated that he would consider applications for the refund of said items of \$4,890.77 and \$3,557.73 deducted as aforesaid on January 11, 1945.

8. On or about January 9th, 1946, the plaintiff did file its claims (Exs. 4 and 5) with the Comptroller General for refunds of the said sums of \$4,890.77 and \$3,557.73.

9. On February 2, 1946, the Comptroller General advised the plaintiff of his disposition of the two said claims for refund as follows (Ex. 6):

Amount claimed	\$8,448.50
Amount allowed	\$4,927.98
Difference	\$3,520.52

Bill G-534, Voucher 329413, 3/42 W. M. Dixon B/L
WE-231286, 11/17/41

Alcoa Steamship Co., Inc., New York office.

Paid \$14,230.92 Should be \$17,788.65 due carrier
\$3,557.73.

Bill G-639, Voucher 357409, 3/42, W. M. Dixon, B/L
WE-298987 1/1/42

Port of St. Joe, Fla., to Port of Spain, Trinidad,
B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$19,563.06 Should be \$24,453.83 due carrier
\$4,890.77.

Deduction

[fol. 39] Bill G-1247, Voucher 295647, 9/42, J. P. Till-
man, B/L WE-310320 6/13/42

Mobile, Alabama to Port of Spain, Trinidad, B. W. I.

Paid \$3,520.52 Should be Nil Overpaid \$3,520.52

The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states "S.S. Gunvor has been lost due to enemy action".

10. The aforesaid deduction of \$3,520.52 was for freight money paid to the plaintiff September 15, 1942 (Ex. 7), for a shipment of government cargo of lumber on the S.S. Gunvor from Mobile, Alabama, to Port of Spain, Trinidad, for which there was issued a "government bill of lading" dated June 13th, 1942 (Ex. 9) which provided in part as follows:

General Conditions and Instructions

Conditions

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from [fol.40] consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Instructions

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the [fol. 41] transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading," on the standard form prescribed therefor which when finally consummated by acknowledgment of the "Certificate and Waiver by Transportation Company", shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.

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6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its

accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

11. The form of Consignee's Certificate (foot of Ex. 11) referred to in paragraph 2 of the "Instruction" in government's bill of lading is as follows:

[fol. 42] Consignee's Certificate of Delivery

I have this day received from _____ (name of transportation company) at _____ (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was/was not by the Government.

Weight pounds
(in words) (in figures)

(Consignee) (Date)

12. The usual form of the plaintiff's bill of lading (Ex. 10) in use at the time of the said shipment of cargo on the SS. Gunvor provided as follows:

3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise occasioned by war, rebellion, riots, strikes, stoppage of labor, lockouts or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather, ice; or any conditions, whether or not of a like kind to those herein stated, not shown due to Carrier's fault; and notice to shipper or others of any danger of such delay or default is hereby waived; and

the Carrier shall not be responsible for any such delay or default; and if loading of the Goods in the customary manner is delayed, or the Vessel is likely to be detained [fol. 43] she may proceed without loading or completing the loading of the Goods.

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6. Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost, or if the voyage be broken up; and the same shall be payable in lawful money of the United States; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); and said lien shall not be waived even though the goods are delivered to a carrier, or landed on the pier, or placed in storage; and in case of loss of any part of the Goods, the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignees and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered.

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[fol. 44] 30. It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparations for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or other-

wise, interference or hostilities on the part of any Power and of all consequence thereof and the vessel shall have liberty in the discretion of the master, owner or any agent or charter thereof to proceed notwithstanding any such risks: * * *

13. While on her voyage carrying the aforesaid government shipment of lumber, the SS. Gunvor was lost due to enemy action, June 14, 1942.

14. On or about the 15th day of September, 1942 the War Department, U. S. A. paid the plaintiff the aforesaid freight monies in the sum of \$3,520.52 (Exs. A & B; Ex. 7).

15. On or about July 24th, 1944, the Comptroller General, referring to the payment of the aforesaid sum of \$3,520.52 as "overpayment", advised the plaintiff as follows (Ex. 8):

"In the audit of your bill described above an overpayment has been noted as explained below.

"Pursuant to Sec. 322 of the Transportation Act, 1940, 54 Stat. 955, a deduction will be made from an amount otherwise due your company unless the amount thus overpaid is refunded within sixty (60) days,—check to be made payable to 'The United States' and mailed direct to this office."

[fol. 45] 16. On February 2, 1946 the Comptroller General deducted (Ex. 6) the aforesaid sum of \$3,520.52 (freight paid on the SS. Gunvor shipment) from a sum of \$8,448.50 found due to the plaintiff as balance of freight on shipments on the SS. Plow City and SS. Alcoa Trader.

17. The defendant has neglected and refused to pay the plaintiff the said sum of \$3,520.52, although duly demanded.

18. This action was commenced July 10, 1946 by the filing of the complaint in the office of the Clerk of this Court.

CONCLUSIONS OF LAW

I. This Court has jurisdiction of the subject matter of this action under T. 28 U. S. C. §41(20).

II. This cause of action arose February 2, 1946. The action is not barred by any Statute of Limitations.

III. That the plaintiff is entitled to recover from the defendant the sum of \$3,520.52.

IV. That the Set-Off and Counterclaim of the defendant for the sum of \$3,520.52 should be dismissed.

V. Let judgment be entered accordingly.

Dated, April 30, 1948.

Vincent L. Leibell, United States District Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

OPINION

LEIBELL, D. J.:

The facts set forth in the above findings warrant the conclusion that the sum of \$3,520.52 was illegally withheld by the Comptroller General on February 2, 1946 as a set-off against freight admittedly due for shipments on the SS. Plow City and the SS. Alcoa Trader. The set-off represented a sum which had theretofore been paid by the Comptroller General to the plaintiff as freight on a shipment of lumber on the SS. Gunvor, owned and operated by the plaintiff, which was lost through enemy action on June 14, 1942. The legal question presented involves the interpretation of the provisions of the government bill of lading and of the bill of lading of the carrier. The rules and conditions of the carrier's bill of lading were incorporated into the government's bill of lading by reference, "unless otherwise specifically provided or otherwise stated on" the government's bill of lading.

The carrier's bill of lading contained the customary provision that the freight was to be deemed fully earned and due and payable—goods or vessel lost or not lost—whether freight was to be prepaid or to be collected at destination. If there is nothing in the government's bill of lading, specifically providing to the contrary, i. e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of \$3,520.52 was improperly deducted by the Comptroller General.

The government contends that the provisions in paragraph 1 of the conditions and in paragraph 2 of the instructions, on the back of the government's bill of lading, are so clearly inconsistent with the provisions of paragraph 6 of the terms printed on the back of the carrier's bill of

[fol. 47] lading (all of which are quoted in the findings) as to bar the carrier from any claim for freight on any shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the carrier's vessel by enemy action.

I am of the opinion that the aforementioned provisions of the bills of lading are not inconsistent. The provisions of its own bill of lading, cited by the government, have to do with the "evidence" that must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made. The provisions of the carrier's bill of lading, which declares that the freight is payable "goods or vessel lost or not lost", covers the liability of the shipper for freight if there is no delivery at all because the goods have been destroyed through no fault of the carrier. The two provisions can thus be given effect in respect to the situations to which they apply: the one where there is a delivery of the shipment; the other where the shipment is lost.

A bill of lading is "accomplished" not by transportation of the shipment to its destination. Something more is required; the delivery at destination must be made bona fides to the person apparently having the right to receive the shipment.

The word "accomplished" when used in association, with the term "bill of lading" has had a meaning in mercantile circles which goes back to the time when a bill of lading was prepared and signed in a set. It was customary to insert in bills of lading drawn in sets the provision that one of them "being accomplished, the others to stand void". The duty devolved on the master to make delivery to the rightful owner and if he had no knowledge that any other part [fol. 48] of the bill of lading, other than the part presented had been indorsed, he could "properly and safely deliver in accordance with the indorsement and holding of the part presented, without inquiry as to the other". *Carrier on Carriage of Goods by Sea*, Sec. 2. "If upon one of them the shipowner acts in good faith, he will have 'accomplished' his contract, will have fulfilled it, and will not be liable or answerable upon any of the others". *Glyn v. East & West India Dock Co.* (1882), 7 A. C. 591 at p. 599 cited in Sec. 55. See *G. H. M. Thompson*, "Bills of Lading" p. 211, where he uses the word "executed" as meaning the same

thing as "accomplished"—"One bill being executed, the others to be void". See also *Leggett*, "*Bills of Lading*" p. 569; and *Duckworth*, "*Charter Parties and Bills of Lading*" page 74.

The government bill of lading in the case at bar was not drawn in the form of a set. Paragraph 2 of the Instructions on the back of the bill of lading directed that a "Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment". That paragraph also stated that "Only one original bill of lading will be issued for a single shipment". The paragraph then goes on to state what shall be done with the documents: the shipping order shall be furnished the initial carrier; the original bill of lading and memorandum copies shall be signed by the agent of the receiving carrier, returned to the consignor and the original promptly mailed to the consignee. Then, "the consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the services will be paid".

[fol. 49] It is clear that the government did not intend to pay on presentation of any of the memorandum copies of the bill of lading; they were to be "used as administration officers direct". The government required presentation of the original bill of lading, with the consignee's certificate duly signed. To meet a situation where the original bill of lading was lost or destroyed, paragraph 4 of the Instructions provided that the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading", on the standard form prescribed therefor "which when finally consummated by acknowledgment of the 'Certificate and Waiver by the Transportation Company' shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account".

The words "accomplished" and "accomplishment", in relation to the bill of lading, appear in paragraph 6 of the Instructions on the government's bill of lading, which deals with loss or damage to property while in the possession of the carrier. Paragraph 6 provides that "such loss or damage shall when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be before its accomplishment". But "should the loss or damage not

be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered * * *

If the government wanted to negative the provisions of paragraph 6 of the terms of the carrier's bill of lading, in relation to the payment of freight "Goods or vessel lost or not lost", it could have done so in a single sentence by providing that no freight shall be payable if the shipment is lost. The government prepared the form of its own bill of lading. If it is indefinite or ambiguous, that is not the [fol. 50] fault of the plaintiff. If it permits of more than one interpretation, the plaintiff is entitled to the more favorable interpretation.

The question of the right of a carrier to payment of freight where the cargo is lost with the destruction of the vessel or where the carrier is unable to present a bill of lading properly accomplished, was before the Comptroller of the Treasury during the First World War. In Volume 24, Decisions of the Comptroller of the Treasury, p. 707 (May 27, 1918) it was held that the liability of the government for freight charges would arise "when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel". On April 7, 1942 the Comptroller General rendered an opinion to the Secretary of the Navy (Vol. 21 D. C. G., p. 909) in which he held that where the carrier claimed charges without being able to present evidence of delivery, it could be required to show the facts and circumstances it relied upon as relieving it from the duty "to effect delivery and to obtain, receipt from the consignee". There are decisions of the Comptroller General in December 1942 and subsequent thereto refusing payment of freight where the goods shipped were lost by enemy action and so not delivered at destination. But there do not appear to have been any to that effect in June 1942 or prior thereto. The SS. Gunvor was lost June 14, 1942. The payment of freight on the shipment of lumber on the SS. Gunvor was made September 15, 1942. When the plaintiff received the shipment on the SS. Gunvor in June 1942, it was entitled to rely on the prevailing interpretation of these bills of lading provisions in relation to payment of freight, where the vessel is lost.

There is nothing unusual or unconscionable about the provisions of paragraph 6 of Alcoa's bill of lading. Al- [fol. 51] through the common law rule was that freight

was earned only if the shipment was delivered (*The Louise*, 58 F. Supp. 445), nevertheless for many years bills of lading have contained the provision that freight was considered earned, vessel lost or not lost. And such provisions have been upheld where the loss was not due to the negligence of the carrier. *Allanvilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, p. 385. The government knew of this practice when it prepared its own form of bill of lading, standard form No. 1059, approved by the Comptroller General August 24, 1928.

In *Quarrington Court*, 122 F. 2d 266 at p. 268 the Circuit Court of Appeals, this Second Circuit held that:

"The provision that freight was payable on destination at outturn weight does not override the provision that it is to be paid regardless of the loss of the ship."

The provision as to payment destination at outturn weight and the provision as to payment on presentation of the bill of lading properly accomplished are of almost equal significance. If the one was held not inconsistent with a provision that freight was payable regardless of the loss of the ship, the other should receive a similar interpretation.

In construing the provision of the bills of lading in relation to the shipment on the SS. Gunvor we may take judicial notice of the fact that in June 1942 there was real danger of loss of the vessel in the Caribbean due to the activity of enemy submarines. The bill of lading of the carrier contained a war clause (par. 30) to the effect that "this shipment is at the sole risk of the owners thereof, of all risks [fol. 52] of war" including "sinking by exploding mines, torpedoes, or otherwise". The government needed the lumber shipped on the SS. Gunvor in the construction of war bases at Trinidad. The carrier was willing to undertake the carriage in an area of war activity. If the carrier was to be deprived of its rights under the clause that freight was payable "Goods or vessel lost or not lost", that should have been clearly and specifically stamped thereon or stated in the government's printed bill of lading, as it did in paragraph 7 of the printed conditions of the government's bill of lading in respect to the rules and conditions governing commercial shipments as to the period within which notice of claim shall be given the carrier and suit instituted.

Plaintiff brings this suit under the Tucker Act, 28 U. S. C. § 41(20), which provides in part:

"Section 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:

Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands [fol. 53] whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *"

The government contends that the action should have been brought under the Suits in Admiralty Act, T. 46 U. S. C. § 742, arguing that the bill of lading was a maritime contract and related to a cargo owned by the United States. A similar question was before Judge Hulbert in *American President Lines v. United States*, 75 F. Supp. 140, and he held that this Court had jurisdiction under 28 U. S. C. § 41(20), and that the claim was not one contemplated by the Suits in Admiralty Act. I agree with his conclusion, for the reasons stated therein and the decisions cited to support it.

The defendant is urging that this Court's sole source of jurisdiction to hear plaintiff's claim is under the Suits in Admiralty Act and that therefore the complaint herein should be dismissed because of the two year statutory limitation on actions brought under the Suits in Admiralty Act. Assuming arguendo, that only a court of Admiralty has jurisdiction of plaintiff's claim, if the action were transferred to the Admiralty side of this court, the two year statute would not bar it, since the claim arose on February 2, 1946, when the illegal deduction of \$3,520.52

was made by the Comptroller General. What the defendant seeks is a dismissal of the action, requiring the institution of a new suit, one under the Admiralty Act, which might furnish some basis for a defense of the statute of limitations.

It is unnecessary to transfer this suit to the Admiralty Calendar. The action is founded upon a contract for carriage of the shipment by a private vessel as evidenced by [fol. 54] the bill of lading. The fact that the government owned the cargo does not make this a claim to which the Suits in Admiralty Act applies. The Suits in Admiralty Act substituted a libel in personam for a libel in rem where a government owned merchant vessel or cargo might otherwise be subject to an in rem proceeding. The cargo that was carried on the SS. Cunvor was completely lost and the cargoes carried on the SS. Plow City and SS. Alcoa Trader were delivered. No in rem proceeding could be brought against any of those cargoes. No proceeding in rem could have been brought, if the cargo had been privately owned, at the time this action was commenced. (See § 742 of T. 46 U. S. C. A.) Any lien on the cargo for freight is relinquished by delivery of the cargo. *Eastern Transportation Co. v. United States*, 159 F. 2d 349.

The claim here is based on the action of the Comptroller General in unlawfully withholding a sum due for freight. It is also founded upon a law of Congress (Sec. 322 of the Transportation Act, T. 49 U. S. C. § 66) which provides:—

“§ 66. Government traffic; payment for transportation; deduction of overpayments.

Payment for transportation of the United States mail and of person or property for or on behalf of the United States by any common carrier subject to chapters 1, 8 and 12 of this title, as amended, or chapter 9 of this title, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier. Sept. 18, 1940, c. 722, Title III, § 322, 54 Stat. 955.”

[fol. 55] The action of the Comptroller General, as his notice of July 24, 1944 stated, was taken “pursuant to Sec.

322 of the Transportation Act" [T. 49 U. S. C. § 66]. The claim of plaintiff arose as a result of that action. The Supreme Court has held that there is no distinction between claims "arising under" and those "founded upon" a law of the United States. *United States v. Emery*, 237 U. S. 28. See also *Carriers Inc. v. United States*, 106 F. 2d 707.

For the reasons hereinabove stated I have concluded that this court has jurisdiction of this claim under the Tucker Act and that the plaintiff is entitled to judgment on the merits for the amount claimed.

Dated, April 30th, 1948.

Vincent L. Leibell, United States District Judge.

[fol. 56] IN UNITED STATES DISTRICT COURT

JUDGMENT—May 14, 1948

This cause came on to be heard on April 2, 1948, and was argued by counsel and thereupon, upon consideration thereof, and on the Court's written opinion with Findings of Fact and Conclusions of Law, Filed on May 3, 1948, it is ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of \$3,520.52, and that the Set-off and Counterclaim of the defendant for \$3,520.52 be dismissed.

Dated: May 14th, 1948.

Approved.

Vincent L. Leibell, U. S. D. J.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the judgment entered in this action on May 14, 1948, which ordered, adjudged and decreed that plaintiff recover from the defendant the sum of \$3,520.52 and that the set-off and counter-claim of the defendant for \$3,520.52 be dismissed, and said defendant hereby appeals from each and every part of the said judgment.

Notice is further given that upon the said appeal from the said judgment, defendant will likewise appeal from the denial of its motion made during the trial to dismiss the complaint for lack of jurisdiction.

Dated, July —, 1948.

John F. X. McGohey, United States Attorney, Attorney for Defendant, Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol.58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein as follows:

1. That plaintiff's exhibit 1, which is the Comptroller General's Return, need not be printed in full, but that the first page of the said exhibit, one paragraph on page 5, one paragraph on page 6 and a part of one of the paragraphs on page 7 shall be printed.

2. That plaintiff's exhibit 10, which is Alcoa Steamship Company's regular form bill of lading, need not be printed in full, but that the clauses numbered 3, 6, and 30 of the said bill of lading shall be printed.

3. That defendant's exhibit C, which is a notice of the Comptroller General and which is substantially similar to plaintiff's exhibit 6, need not be printed.

[fol. 59] 4. That, except as above provided, all exhibits shall be printed in full.

5. That exhibits or parts of exhibits not printed may be produced and used on the argument on appeal with the same force and effect as if the same had been printed.

Dated: New York, New York, 1949.

John F. X. McGohey, United States Attorney, Attorney for Defendant-Appellant. Wood, Molloy, France & Tully, Attorneys for Plaintiff-Appellee.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing is a correct transcript of the record of the District Court of the United States for the Southern District of New York in the above entitled matter and that the Clerk may certify the same as the record on appeal.

Dated: New York, January —, 1949.

John F. X. McGohey, United States Attorney, Attorney for Defendant-Appellant. Wood, Molloy, France & Tully, Esqs., Attorneys for Plaintiff-Appellee.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT; OCTOBER TERM, 1948

No. 257

(Argued May 6, 1949. Decided June 29, 1949)

Docket No. 21319

ALCOA STEAMSHIP COMPANY, INC., Appellee,

v.

UNITED STATES OF AMERICA, Appellant

Before L. Hand, Augustus N. Hand and Frank, Circuit Judges

On appeal by the United States from a decree of the District Court for the Southern District of New York, granting a recovery under the Tucker Act* for money earned as freight.

Leavenworth Colby for the appellant.

Melville J. France for the appellee.

L. DeGrove Potter and Walter P. Hickey filed a brief as amici.

* § 1346 (A-2), Title 28, U. S. C.

L. HAND, Circuit Judge:

The question in the case is whether the United States overpaid the freight due to the petitioner, Alcoa Steamship Company, Inc., upon a cargo of lumber shipped upon the petitioner's ship, "Gunvor." The United States paid the agreed freight on the cargo in question, but later deducted the same amount from other freights, concededly due the petitioner upon other shipments; and it has sued to recover the deduction. The facts out of which the claim arises are as follows: On June 13, 1942, the "Gunvor," at Mobile lifted a cargo of lumber bound for Trinidad under a "government form" bill of lading; and on the first day out she was sunk by enemy action and she and her cargo became a total loss. In spite of the carrier's failure to complete the voyage, the United States paid the freight on September 25, 1942, and the only issue is whether the freight had been earned. That concededly depends on the proper reading of the bill of lading, the important passages in which were the first of seven "Conditions" and the second of seven "Instructions," all upon the back of the bill. The first "Condition" was as follows:

"Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specified."

The second of the seven "Instructions," so far as it is important here, was as follows: "The consignee on receipt [fol. 64] of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made." The "consignee's certificate" was a "certificate of delivery" spread on the face of the bill, which declared that the consignee had received the goods; but in the case at bar, in place of such a declaration, the following words were substituted: "SS. 'Gunvor' has been lost due to enemy action." The consignee—the District Engineer, United

States Engineers Office, Port of Spain, Trinidad—signed the certificate so altered on August 8, 1942; and freight was paid, when the carrier presented the bill of lading, after receiving it from the District Engineer so endorsed.

The United States relies upon these documents, taken in conjunction with the well-settled law that freight is never earned until the cargo is delivered.* The carrier answers that the bill of lading had incorporated by reference the carrier's "usual form" of bill of lading which provided that "full freight to destination, whether intended to be prepaid or collected at destination" is "due and payable . . . as soon as the Goods are received for purposes of transportation; and the same . . . shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid). Goods or vessel lost or not lost. . . ." That is the customary stipulation in bills of lading; and the language alleged to incorporate it into the government bill is the second of the "Conditions," which was as follows: "Unless otherwise specifically provided or otherwise stated therein, this bill of lading is subject to the same rules and [fol. 65] conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." The first issue is whether the language quoted from the first "condition" "specifically provided" "otherwise" than that "full freight . . . should be due and payable . . . as soon as the Goods are received for purposes of transportation." The Comptroller-General had ruled in April, 1942, when certain consignees in the Philippines could not be found because of war conditions, but, when the goods were in fact delivered at destination, that the freight had been earned, although obviously the carrier had not performed the first "Condition" to the letter. On the other hand the petitioner had had warning from the same official that in the circumstances here in question recovery was still an open question. We do not think that the administrative rulings should have any substantial weight in our decision.

It will be noted that the carrier's "usual form" provided that full freight should become "due and payable" as soon as it received the goods "for purposes of transportation," which would mean that the United States would become

* *The Gracis D. Chambers*, 248 U. S. 387.

liable for the entire freight, not when the ship lifted the lumber, but even from the moment it came into the carrier's possession. In order to construe the first "condition" consistently with such a result, we must first read the words: "Prepayment of charges shall in no case be demanded," as referring only to the time when the carrier may ask for payment, and not as imposing any condition upon the obligation itself. True, the "usual form" covered, not only situations in which freight was "intended to be prepaid," but those in which it was to be "collected at destination"; but it appears to us, even though the words we have just quoted from the "Condition" stood alone, that it would be very unnatural to construe them as applying only to the [fol. 66] time of payment of an absolute obligation. We can see no reason why the United States—which drew the bill—should wish to defer the payment of a claim which it must inevitably pay at some time. It was not, like a private person, in need of any extension of its credit. Why, if the freight was earned upon mere delivery, should it be interested in postponing its collection? However, the words did not stand alone, and those that immediately followed prove that, at least in one important respect, the substance of the obligation was changed. The sentence went on to say that no "collection shall be made from the consignee," and that deprived the carrier of its ancient lien for freight. It must give up the goods to the consignee upon getting his signature to the "certificate of delivery," and receiving from him the bill so signed. Only then did the bill of lading, "properly accomplished," become "the evidence upon which settlement for the service will be made." The petitioner seeks to limit these conditions to cases where the goods have in fact been delivered to the consignee. We cannot agree. As we have said, the denial to the carrier of its lien for freight had nothing to do with the time of payment; and to interpolate into the other language the necessary limitation appears to us gratuitous and quite unwarranted. Rather we think that the "Condition" and the "Instruction" together constitute a carefully devised plan by which the United States, not only asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get; but went even further by depriving the carrier of one of its best established privileges. Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for

performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon pay-[fol. 67] ment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general.

The second point on which the United States relies is that statute * which provides that "in all cases of contracts for the performance of any service . . . payment shall not exceed the value of the service rendered." Did this forbid the United States to deliver any goods to a carrier under a bill of lading of the "usual form"? Maybe not; it is at least plausible to say that, if the industry concerned accepts mere delivery of the goods to the carrier as a service whose "value" is the whole freight, and throws upon the shipper the risk of performance, and if no provision to the contrary is made by the parties, delivery is a "value" which will satisfy the statute. Nor in that event would it be an "advance of public money," if the United States, as shipper, paid the freight when the carrier accepted the goods. However, since in the case at bar the parties did specifically provide to the contrary by declaring what the services should be on which payment depended, we may leave the question unanswered.

Decree reversed; petition dismissed.

[fol. 68]

DISSENTING OPINION

AUGUSTUS N. HAND, Circuit Judge (Dissenting):

The bill of lading issued by Alcoa Steamship Company, Inc., clearly provided for the payment of freight whether or not the vessel was lost. Such a provision now general in commercial bills of lading must govern "unless other-

* § 529, Title 31, U. S. C.

wise specifically provided or otherwise stated" in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading prepared by the government, and therefore to be construed against it in resolving any ambiguities, "specifically" have provided otherwise. I do not think that the clauses in the government bill of lading have "specifically" provided otherwise. At best, they seem ambiguous and in fact to fall short of any clear provision that in terms relieves the government from the precise exemptions in the carrier's bill of lading.

I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary. *Allandwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377; *International Paper Co. v. The Gracie D. Chambers*, 248 U. S. 387. Nor do I see that the provisions of Condition 1 or Instruction 2 control the case at bar. Instruction 6 says that: "In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment." Condition 1 and Instruction 2 relate only to the mode of settlement when the freight has been delivered. Instruction 6 apparently deals with a case where there has been partial delivery, and seems to involve the assumption that there may be instances where there is a partial loss for which freight [fol. 69] charges may be collected under the terms of the commercial bill of lading. Instruction 6 does no more than require a notation of such a partial loss on the government bill of lading and contains nothing to indicate that such partial loss would prevent the bill of lading from being "properly accomplished."

I am not convinced that there was no reason for the provision in Condition 2 that "prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee," unless it was intended that freight charges were never to become due except in the event of the successful completion of the voyage. The government may have had financial reasons for barring prepayment of charges and for only allowing collection from itself rather than from the consignee, and I see no reason for supposing

that it was indifferent to the financial benefits it might obtain through a delay in payment. The agreement that freight charges were to be paid only after delivery in cases where the voyage had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo, in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor.

For the foregoing reasons, I think Condition 1 and Instruction 2 were insufficient to override the plain provision of the commercial bill of lading.

Moreover, only two months before the shipment in the case at bar the Comptroller General made a ruling regarding a shipment by the United States to the Philippines which apparently arrived shortly before the Japanese took [fol. 70] possession, where the government and commercial bills of lading were identical with those we have under consideration. The Secretary of the Navy had asked for instructions from the Comptroller General as to whether he should pay the freight where the vessel had reached the Philippines, but there was no proof that the cargo had been received by the consignee or that the latter had receipted for it upon the bill of lading. The instructions of the Comptroller to the Secretary were as follows:

“ * * * you are advised that this office will not be required to object to the payment, otherwise proper of carriers' bills for transportation charges on shipments to the Philippine Islands or Guam in instances where the original bill of lading or other form of receipt showing delivery to the consignee cannot be obtained, if a satisfactory showing be made of facts or circumstances reasonably establishing the carriers' inability, by reason of war, to effect delivery and obtain a receipt from the consignee, where the claim in each instance is supported by a memorandum copy or shipping order copy of the bill of lading showing the material shipped and corresponding in pertinent detail with the memorandum copy duly signed by the carrier's agent and retained administratively as contemplated

in the instructions on the reverse of the original bill of lading. * * * [21 Comp. Gen. 909, 913.]

Even though we do not regard the above ruling as controlling our interpretation of the bill of lading in the present case, it at least shows that the meaning of the government bill of lading was sufficiently doubtful to lead the Comptroller to treat the provisions of Condition 1 and Instruction [fol. 71] 2 as subject to exceptions and defenses where delivery could not be completed owing to war conditions.

For the above reasons, I think the decision of the court below was right and should be affirmed.

[fol. 72] IN UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Learned Hand, Chief Judge; Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

ALCOA STEAMSHIP CO., INC., Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant

JUDGMENT—Filed June 29, 1949

Appeal from the District Court of the United States for the
Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed; petition dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING

This is a petition by the plaintiff-appellee for rehearing under Rule XXVIII of the Rules of the United States Court of Appeals for the Second Circuit.

Notwithstanding the high esteem in which counsel for the appellee holds the honored judge who wrote the prevailing opinion he believes the errors contained in that opinion require and justify this application. Jove sometimes nods. The Olympians are not always right.

First

In the present case the Government Bill of Lading provides:

"Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

There is no doubt in this case under carrier's bill of lading recovery would have been permitted to the carrier.

As the dissenting opinion accurately states: The provision for the payment of freight whether or not the vessel [fol. 75] was lost "now general in commercial bills of lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading *prepared by the government and therefore to be construed against it in resolving any ambiguities*, 'specifically' have provided otherwise." (Emphasis supplied.)

When it requires from two to three pages of reasoning, much of it by assumption or by inference, to establish that it is "otherwise *specifically* provided," it would hardly seem that one should say it has been provided "specifically". When by the Government bill it was desired to avoid a short statute of limitations contained in the carrier's bill

it "specifically" said so! (Condition 7 of Government Bill, Exhibit 9). When by the Government bill it was desired to avoid prepayment of freight permitted under the carrier's bill, it "specifically" said so! (Condition 1 of Government Bill, Exhibit 9).

Specifically means with exactness and precision. (Webster.)

The prevailing opinion has demonstrated beyond a peradventure that "*specifically*" is nonexistent on the issue presented on this appeal.

Second

The prevailing opinion is in error in its application of the thought that, "We do not think that the administrative rulings should have any substantial weight in our decision."

Perhaps there may be in some cases justification for this highly generalized conclusion. However in the instant case there is none.

The Government Bill of Lading is the product of and approved by the Comptroller General August 24th, 1928. [fol. 76] (See Exhibit 9, p. 23a Exhibit Volume.) If a Government official is not to be an interpreter of an instrument which he prepares and drafts for public use, then the attempt of courts to look for Congressional intent in a law which has been passed, to see what Congress in Committee or in Session has said, is all off the beam. No judge or court has yet so held. Until there is authority along that line what the Comptroller General says about the instrument which he prepares becomes of substantial weight. What he says it means is presumptively what it was intended to mean. *And officially the Comptroller General has sustained the appellee's interpretation.*

Third

The prevailing opinion sustains itself in part by using the support of proof which is not in the record.

The Attorney General's Office improperly incorporated in its brief and argument a part of a letter which formed no part of the record of the trial (p. 21 of appellant's brief). That letter has nevertheless, no doubt unwittingly, been used to reach and fortify the conclusion in the prevailing opinion. This is not a case of judicial notice. The incorpo-

ration of that letter violates the most elementary rule of procedure and practice.

Fourth

The reasoning of the prevailing opinion revolves around the statement that it is the "well-settled law that freight is never earned until the cargo is delivered." But as the dissenting opinion decisively points out:

"I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary."

[fol. 77] We know that for more than 30 years (1918) this last has been the accepted law. So that in 1928 when the Comptroller General formulated the Government Bill of Lading Form, and for ten years before, the principle which is reiterated by the prevailing opinion had had no application in the usual and customary commercial bill of lading. It follows that such statements as "it was not unnatural for the United States, if its own insurer, to wish to have the privilege which the law gives to shippers in general" are deceptive. Such a conclusion overlooks the well settled commercial practice that freight is earned on shipment and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments." Shippers in general had no privileges except those in the customary and usual bill of lading.

The Court suggests that such customary shifting of the risk may have come about "because of the carrier's superior bargaining position". It is urged that no basis has been shown for such a suggestion; even if this were the correct explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there *was* such a well established practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers had been adjusted on the basis of the existence of that practice at the time the shipment of the appellant was made.

The prevailing opinion suggests that there is "no reason why the United States . . . should wish to defer the payment of a claim which it must inevitably pay at some

time." An excellent reason is quite apparent to those familiar with the cumbersome routine and delays inherent in the Government's disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation by the carrier [fol. 78] and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is clear that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Fifth

We feel that in view of the fact that the prevailing opinion has struck into fields which were neither briefed nor argued by the appellant, the appellee should be given an opportunity to be heard. We believe that there are answers to the argument of the prevailing opinion and that a hearing should be given to present them.

Sixth

Judge Jerome Frank in his work, "Law and the Modern Mind", which has been widely acclaimed, says:

"The judge at his best, is an arbitrator, a 'sound man' who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely 'find' or invent some generalized rule which he 'applies' to the facts presented to him. He does 'equity' in the sense in which Aristotle—when thinking most clearly—described it. . . . the arbitral function is the central fact in the administration of justice."

We feel that this court in this cause should be judges at their best and do equ. v. There is no just reason why government should hold any preferred position among shippers.

[fol. 79] The prevailing opinion assumes that any particular shipper, including the United States, may, by special agreement with the carrier, avail itself of some sort of

"privilege" given by the admiralty law to require the carrier to transport the cargo on the old basis that freight is not earned and payable unless the goods are delivered by the carrier at destination.

Such an assumption has no foundation when the carrier's charges and established terms of carriage contemplate that the risk of loss of freight shall be upon the cargo owners. The assumption fails to take into account the provisions of Sections 16 and 17 of the Shipping Act, 1916 (46 U. S. C. Secs. 815, 816), which, among other things, make it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person in any respect whatever or to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on the line of such carrier and which also forbid carriers to demand, charge or collect charges which are unjustly discriminatory between shippers.

It is therefore clear that where the carrier's terms of shipment and charges are based on freight being earned upon shipment and, therefore, at shipper's risk, it would be unlawful for the carrier to discriminate in favor of any particular shipper by assuming the freight risk, at least without making a reasonable extra charge. Furthermore, such terms would have to be made available to all shippers desiring to take advantage of them.

The statute makes no exception exempting the Government from the duties which it imposes on carriers and shippers alike. Nor does the statute permit the carrier to discriminate in favor of the Government.

[fol. 80]

Seventh

The present judicial score in this case is two-two. As to opinions the score is one for the appellant and two for the appellee. All of which seems to indicate that the cause is a close one. If that be so then the errors which have been pointed out have tipped the balance against the appellee and the cause should be reviewed.

Respectfully, Wood, Molloy, France & Tully, Attorneys for Plaintiff-Appellee.

[fol. 81]

Certificate of Counsel

I hereby certify that I have examined the foregoing petition for a rehearing, and in my opinion such petition is well founded and should be granted by this Honorable Court and said petition is not presented for purposes of delay.

Dated: July 11, 1949.

Melville J. France.

[fol. 82] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

Before L. Hand, Augustus N. Hand and Frank, Circuit
Judges

DENIAL OF PETITION FOR REHEARING

Wood, Molloy, France & Tully for the Petitioner.

PER CURIAM:

Petition for Rehearing Denied.

C. J.J.

Filed: July 18, 1949.

[fol. 83] IN UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Learned Hand, Chief Judge; Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed July 18,
1949

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) Alexander M. Bell, Clerk.

[fol. 84] [File endorsement omitted.]

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1] PLAINTIFF'S EXHIBIT. 1

Return of Comptroller General

Pursuant to stipulation, the first page, one entry on page 5, one entry on page 6, and a part of an entry on page 7 only are printed.

Form 40 A

Advice of Payment of Settlement to Accompany Check
General Accounting Office

Claim No. 744034

Washington, January 11, 1945.
(Date)

In correspondence please refer to above claim No.

Certificate No. T-230977

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York 4,
New York.

(Checks to be drawn as below)

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

Seventy-six and 39/100

Dollars (\$76.39)

on account of Freight Bill NY-3578. (War Department)
212/50905 Engineer Service, Army, 1942-1945

(8-32267 P 430-03 A 0905-24)

[Rubber Stamp] 501-970 P 970-13 S 99-999

[fol. 2a] Checks to issue:

Claimant as above, \$ 8.62 *ch*
 Treasurer of the United States, \$67.77

ch, handwritten in red *Italic* figures circled in red.

For credit to:

"21-110/20002 Emergency Fund for the President,
 War (Allotment to War Department), 1940-1942"
 Limitation 21-110/20002.007.

Amount Claimed \$23,137.79

Amount Allowed 8.62

Difference \$23,129.17

(See attached sheets)

The enclosed Treasury check is in settlement of said claim(s).

Lindsay C. Warren, Comptroller General of the
 United States, By A. J. Stout.

CLAIMANT'S NOTICE

(Page 5) Bill G-639, Voucher 357409, 3/42 Dixon
 B/L WE-298987, 1/1/42, Pt. of St. Joe, Fla. to Pt. of
 Spain, Trinidad, B.W.I.

Paid \$24453.83. Should be \$19563.06. Difference \$4890.77.

[fol. 3a] (Page 6) Bill G-534, Voucher 329413, 3/42 Dixon.
 B/L WE-231286, 11/17/41, Tampa, Fla. to Pt. of Spain,
 Trinidad, B.W.I.

Paid \$17788.65. Should be \$14230.92. Difference \$3557.73.

(Page 7 Basis: No authority for 25% increase in rates on
 lumber in Exceptions #49 to Windward & Leeward
 Islands Conf. Tariff 1W1.

[fol. 4a]

PLAINTIFF'S EXHIBIT 2

(Letter of General Accounting Office)

GENERAL ACCOUNTING OFFICE, WASHINGTON

Claims Division

In Reply Please Quote

OCD-WJV

Dec. 18, 1944.

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York, New York.

DEAR MR. COLE:

Reference is made to your letter of December 5, 1944, relative to the application of the 25% increase in freight rate applicable on lumber moving from Gulf ports of the United States to the West Indies ports served by your company, in which you suggest that this office contact Mr. L. Tibbott, Chief, Agreement Section, Division of Regulations, United States Maritime Commission, for an explanation as to the application of the 25% "surcharge".

Under the provisions of section 305 of the Budget and Accounting Act, this office is vested with the authority to settle and adjust all claims and demands by the Government of the United States, or against it, for the transportation of Government property.

Since the rates and agreements involved have been reduced to writing and are contained in published tariffs [fol. 5a] publicly filed with the United States Maritime Commission, of which this office has been furnished with a complete copy, it appears no useful purpose would be served by such discussion. However, this office will give consideration to any material evidence which you may desire to furnish regarding this matter.

Respectfully, A. H. Epperson, Assistant Chief,
Claims Division.

[fol. 6a]

PLAINTIFF'S EXHIBIT 3

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP CO., INC., NEW YORK

February 16, 1945.

General Accounting Office
3800 Newark Avenue, N. W.
Washington, D.C.

Attention: Mr. A. H. Epperson, Assistant Chief, Claims
Division.

DEAR MR. EPPERSON:

We refer to your letter of December 18th (O C D-W J V) concerning your questioning of the application of a twenty-five (25) per cent increase on basic freight rates effective September 18, 1939, on lumber moving from Gulf Ports, United States of America, to the West Indies.

We of course understand that your office is vested with the authority to settle and adjust all claims and demands against the United States for transportation of government property and our suggestion of reference to the Division of Regulations, United States Maritime Commission was occasioned by the thought that the Division might supply facts which would help you to reach a conclusion. Your letter suggests that we submit any material evidence we may desire to furnish regarding this matter and we are glad to avail ourselves of this suggestion. We feel that a clear presentation of the facts leads to a different conclusion from that which you presently entertain. This statement of fact is somewhat lengthy, but it is impossible to shorten it and still give you the complete picture.

{fol. 7a} Alcoa Steamship Company, Inc. was formerly named Ocean Dominion Steamship Corporation and the Corporation frequently used the tradename "Aluminum Line" in the operation of its services from the Gulf and South Atlantic ports.

For the purpose of easy reference we set forth the material part of an order of the Secretary of Commerce. On July 12, 1935, Daniel C. Roper, as Secretary of Commerce, duly issued an order known as Docket No. 128, effective on and after September 1, 1935, pursuant to Sec-

tion 19 of the Merchant Marine Act, 1920, which provided in part as follows:

“(1) Every common carrier by water in foreign commerce shall file with the United States Shipping Board Bureau of this department schedules showing all the rates and charges for or in connection with the transportation of property, except cargo loaded and carried in bulk without mark or count, from points in continental United States, not including Alaska or the Canal Zone, to foreign points on its own route; and, if a through route has been established with another carrier by water, all the rates and charges for or in connection with the transportation of property except cargo loaded and carried in bulk without mark or count, from points in continental United States, not including Alaska or the Canal Zone, on its own route to foreign points on the route of such other carrier by water. The schedules filed as aforesaid by any such common carrier by water in foreign commerce shall show the point from and to which each such rate or charge applies; and shall contain all the rules and regulations which in anywise change, affect or deter- [fol. 8a] mine any part or the aggregate of such aforesaid rates or charges.

“(2) Schedules containing the rates, charges, rules and regulations in effect on the effective date of this order shall be filed as aforesaid on or before October 1, 1935, and thereafter any schedule required to be filed as aforesaid, and any change, modification or cancellation of any rate, charge, rule or regulation contained in any such schedule shall be filed as aforesaid within thirty (30) days from the date such schedule, change, modification or cancellation becomes effective.

“(3) Any schedule, rate, charge, rule or regulation, or any change, modification or cancellation thereof, as aforesaid, when filed shall be accompanied by a sworn statement by a duly authorized person that such schedule, rate, charge, rule or regulation, change, modification or cancellation is the schedule, rate, charge, rule or regulation, change, modification or cancellation in effect on the date indicated via the line of the carrier, or in conjunction therewith.”

In the month of June, 1937, the Windward and Leeward Islands Conference, composed of the American Caribbean Line, Inc., Bermuda and West Indies Steamship Company, Ltd. and Ocean Dominion Steamship Corporation, of which Conference William H. Griffin was Secretary, filed with the United States Maritime Commission in conformity with Docket No. 128, its Freight Tariff LW-1, constituting its Commodity Rates applying from New York (and United States North Atlantic Ports) to Windward and Leeward Island, etc.

[fol. 9a] At that time Ocean Dominion Steamship Corporation (subsequently changed to Alcoa Steamship Company, Inc.), operating as a common carrier by water, also operated a service from United States of America, South Atlantic and Gulf Ports to Windward and Leeward Islands, etc.

Practically simultaneously with the filing by the Windward and Leeward Islands Conference of its said Freight Tariff LW-1 by its secretary, William H. Griffin, the same William H. Griffin, who was also the General Traffic Manager of Ocean Dominion Steamship Corporation, filed on behalf of the last named steamship company with the United States Maritime Commission its concurrence in the rates of Freight Tariff LW-1, and adopted as its own the rates and charges for commodities as set forth in said tariff. That document reads in part as follows:

"That I have been duly authorized to file on behalf of Ocean Dominion Steamship Corporation (Aluminum Line) the rates and charges charged by them for or in connection with the transportation of property from U. S. A. (South) Atlantic and Gulf Ports to Windward and Leeward Islands, Trinidad, British Guiana and Ciudad Bolivar, Venezuela, and that the rates, charges rules or regulations or changes, modifications, or cancellations thereof as shown in Windward and Leeward Islands Conference Freight Tariff LW-1, supplements thereto and reissues thereof, filed with the Division of Regulations by W. H. Griffin, Secretary of the Windward and Leeward Islands Conference, are the rates, charges, rules or regulations or changes, modifications or cancellations thereof actually observed by the Ocean Dominion Steamship Corporation (Aluminum [fol. 10a] Line) effective June 5, 1937, with the excep-

tion of items listed on attached sheet entitled 'Exception No. 1 to Freight Tariff LW-1'."

Said Freight Tariff LW-1, in its "Item #26" listed commodities and their rates. Under the said heading "Item #26" it set forth "Lumber, Yellow Pine—Special arrangement" and provided no rate for yellow pine lumber, because it was not a commodity in usual shipment by the members of the Windward and Leeward Islands Conference. However, yellow pine lumber was a customary commodity carried by the Ocean Dominion Steamship Corporation from United States Gulf Ports to the Windward and Leeward Island, etc. Accordingly Ocean Dominion Steamship Corporation filed with its "concurrence", adopted and filed as above stated, what it termed an "Exception", entitled "Exception No. 1 to Freight Tariff LW-1". That "Exception" set forth rates for yellow pine lumber, which had been omitted from Freight Tariff LW-1, providing in the commodity list such specified rates in place of "Special arrangement", and the said "exception" further provided as to commodities "where no rate is given, Freight Tariff LW-1 rate applies." The use of the term "exception" is perhaps misleading; what it did do was to supply a deficiency which was lacking in the commodity rates, which were listed in "Item #26".

Thereafter Ocean Dominion Steamship Corporation continued to make the charges and rates set forth in the commodity list, "Item #26", of Freight Tariff LW-1, as supplemented by its so-called "Exception No. 1". It was both the purpose and we believe the effect of said "exception" to provide in the commodity list a rate for yellow pine [fol. 11a] lumber for which no rate had been adopted by conference; in place and stead of "special arrangement" in the commodity list there was substituted actual specific rates for yellow pine lumber.

On or about October 17, 1939, the Windward and Leeward Islands Conference of which Ocean Dominion Steamship Corporation was a member and the secretary of which was also general traffic manager of Ocean Dominion Steamship Corporation, filed with the United States Maritime

Commission its "Rate Advice No. 12 to Freight Tariff LW-1", which provided in part:

"Item No. 26 'Before Commodity Rates'—Add: All rates named under Item No. 26 are subject to an increase of 25%. Effective September 18, 1939."

It was the belief of the general traffic manager of Ocean Dominion Steamship Corporation, who was also the secretary of the Windward and Leeward Islands Conference, and also the belief of Ocean Dominion Steamship Corporation that its concurrence in the commodity rates of Freight Tariff LW-1, "Item #26", and "Supplements" thereto carried with it both the benefits and obligations thereof and that no additional filing by it was necessary or required. Under that belief Ocean Dominion Steamship Corporation immediately advised shippers over its services from the Gulf of the 25% increase of basic rates.

The Leeward and Windward Islands Conference notice to shippers on September 16, 1939, was in the following language:

[fol. 12a]

"September 16, 1939.

IMPORTANT NOTICE

"The European war has resulted in the immediate increase in operating costs of the lines members of this Conference which makes it necessary to increase freight rates effective September 18 on cargo destined Trinidad, Barbados, Demerara, St. Martin, St. Bartholomew, St. Kitts, Antigua, Montserrat, Dominica, St. Lucia, St. Vincent, Grenada, Guadeloupe, Martinique and Ciudad Bolivar, with transshipment at Port of Spain.

"The increase will be 25% and will be figured on the base rates. The landing or surcharge of 5% will continue in force and will be assessed on the full freight including the 25% increase.

W. H. Griffin, Secretary.

For and on behalf of the following carriers: American Carribbean Line, Bermuda & West Indies Steam-

ship Co., Ltd. (Furness Withy & Co., Ltd. as agents),
Ocean Dominion Steamship Corporation."

The notice of Ocean Dominion Steamship Corporation to its shippers on the same date was as follows:

[fol. 13a]

"September 16th, 1939.

Important Notice to Shippers

"Due to increased operating costs as a result of the European war, effective September 18th, 1939, there will be a 25% increase in our base freight rates on cargo destined Trinidad, Dominica, Barbados, Demerara, St. Martin, St. Kitts, St. Vincent, Grenada, Guadeloupe, Martinique and Ciudad Bolivar with transshipment at Port of Spain, Trinidad.

"The surcharge of 5% will continue in force on all cargo, except lumber, and will be assessed on the full freight including the 25% increase.

Aluminum Line"

The increase of 25% upon base rates was fair and just. It was charged both by Conference members and by Ocean Dominion Steamship Corporation on its Gulf shipments. We do not know of any one either private shipper or government official, bureau or department that has questioned the justness and fairness of this increase. The United States Maritime Commission Regulation Division, has stated that it has "seen no evidence which would indicate that the rates which you assessed were prejudicial, preferential or otherwise unlawful."

The United States Maritime Commission, however, expressed the opinion that there had been a technical non-compliance with Docket No. 128 in that "Aluminum Line" had not filed its "Important Notice to Shippers" dated September 16, 1939, but raised no question but that the rates in it had been regularly established and enforced.

[fol. 14a] In any event such non-compliance with Docket No. 128, if such there was, did not affect the validity of the 25% increase in base rate; at most it might subject "Aluminum Line" to a penalty for not filing.

However, this technical non-compliance has been cured and the Maritime Commission has accepted as of September 18, 1939, Alcoa Steamship Company's rate advice to

shippers, containing the "25% increase in our base freight rates". A copy of that filing is attached to this letter and marked "Exhibit 1".

We request that you review the question of our lumber rates in the light of the facts herein set forth and we trust that you will find it possible to withdraw your objection to these rates.

Yours very truly, Alcoa Steamship Company, Inc.,
 _____, Auditor.

WTC:AWL

[fol. 15a]

PLAINTIFF'S EXHIBIT 4

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP COMPANY, INC.
 Seventeen Battery Place, New York 4, N. Y.
 Cables: Alcoa-ship, Tel.: Whitehall 4-1500.

January 9, 1946.

General Accounting Office,
 3800 Newark Street, N. W.,
 Washington, D. C.

GENTLEMEN: *Att: Chief of Claims Transportation*

An amount of \$3,557.73 on bill No. G-534 paid by voucher No. 329413 in March, 1942, W. M. Dixon, has been deducted from bill No. N. Y.-3578 by settlement No. T-230977.

Refund in the amount of \$3,557.73 is requested as the deduction of the sum involved was based on the contention that a 25% surcharge was not applicable on rates as published in Exception 49 of Windward and Leeward Islands Conference Tariff No. L-W 1. On February 16, 1945, the Company filed with your office a complete explanation and justification of the application of the said 25% increase. The subject was taken under review by your office and on August 29, 1945 the Company was advised that your office had recognized the merits of the Company's position and that orders had been given to allow the said 25% increase on lumber rates from Gulf Ports.

Very truly yours, Alcoa Steamship Company, Inc.,
 W. T. Cole, Auditor.

WTC:L

[fol. 16a].

PLAINTIFF'S EXHIBIT 5

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP COMPANY, INC.

Seventeen Battery Place, New York 4, N.-Y.

Cables: Alcoa-ship, Tel.: Whitehall 4-1500.

January 9, 1946.

General Accounting Office,
3800 Newark Street, N. W.,
Washington, D. C.

GENTLEMEN: *Att: Chief of Claims Transportation*

An amount of \$4,890.77 on bill No. G-639 paid by voucher No. 357409 in March, 1942, W. M. Dixon, has been deducted from bill No. N. Y. 3578 by settlement No. T-230977.

Refund in the amount of \$4,890.77 is requested as the deduction of the sum involved was based on the contention that a 25% surcharge was not applicable on rates as published in Exception 49 of Windward and Leeward Islands Conference Tariff No. L-W 1. On February 16, 1945, the Company filed with your office a complete explanation and justification of the application of the said 25% increase. The subject was taken under review by your office and on August 29, 1945 the Company was advised that your office had recognized the merits of the Company's position and that orders had been given to allow the said 25% increase in lumber rates from Gulf Ports.

Very truly yours, Alcoa Steamship Company, Inc.,
W. T. Cole, Auditor.

WTC:L

[fol. 17a]

PLAINTIFF'S EXHIBIT 6

(Advice of Payment of Settlement)

Form 40A

Advice of Payment of Settlement To Accompany Check

General Accounting Office

Claim No. 744034

Washington, February 2, 1946.

(Date)

Certificate No. T-283800

In correspondence please refer to above claim No.

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York 4,
New York.

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

Four Thousand Nine Hundred Twenty-Seven and 98/100
Dollars (\$4,927.98)
on account of

Carrier's letters dated January 9, 1946, supplemental to Freight Bills G-534 and G-639, D. O. Vouchers 329413 and 357409, March 1942 accounts of W. M. Dixon. (War Department)

212/60905 Engineer Service, Army, 1942-1946

(8-32795 P430-03 \$1,370.25)

(8-32795 P210-03 \$3,557.73)

(See attached sheet)

[fol. 18a] The enclosed Treasury check is in settlement of said claim(s).

Lindsay C. Warren, Comptroller General of the
United States, By B. Y. Williams.

CLAIMANT'S NOTICE :

(Attached Sheet)

Claim No. 744034

Certificate No. T-283800

Amount Claimed \$8,448.50

Amount Allowed \$4,927.98

Difference \$3,520.52

Bill G-534, Voucher 329413, 3/42, W. M. Dixon, B/L WE-231286, 11/17/41.

Tampa, Fla. to Port of Spain, Trinidad, B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$14,230.92 Should be \$17,788.65 Due carrier
\$3,557.73

Bill G-639, Voucher 357409, 3/42, W. M. Dixon, B/L WE-298987 1/1/42

Port St. Joe, Fla., to Port of Spain, Trinidad, B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$9,563.06 Should be \$24,453.83 Due carrier \$4,890.77

[fol. 19a] *Deduction*

Bill G-1247, Voucher 295647, 9/42, J. P. Tillman, B/L WE-310320 6/13/42

Mobile, Alabama to Port of Spain, Trinidad, B. W. I.

Paid \$3,520.52 Should be Nil Overpaid \$3,520.52.

The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states "S.S. Gunvor has been lost due to enemy action".

[fol. 20a]

PLAINTIFF'S EXHIBIT 7

Memorandum Accompanying Check

Sep. 15, 1942.

The enclosed check, No. _____, settles voucher submitted for payment of the account described in the memorandum hereon.

(No acknowledgment of receipt of check is necessary)

Name: Alcoa Steamship Company, Inc.
Address: 17 Battery Place,
New York, New York

MEMORANDUM

NOTE.—If the payee named in the attached voucher will supply below such data as will identify the check drawn in payment thereof with the account in his office, this slip will be mailed with the check.

U. S. Army, Finance Officer,
War Department, Washington, D. C.
(Department, Bureau, or Establishment)

Bill No. G-1247
Amount, \$3520.52
S/S Gunvor #37
WE 310320
Bill No. M-2209
B/L No. M-109

[fol. 21a]

PLAINTIFF'S EXHIBIT 8

Notice from General Accounting Office

Form 1003

General Accounting Office
Claims Division, Washington

Chief Billing Clerk

Alcoa Steamship Co., Inc.
17 Battery Place, New York City, N. Y.

Jul 24 1944.

Your Bill No. G 1247
Frt

Kind of service rendered

War

(Department or Agency)
(Bureau or Office)

Amount Paid—\$3520.52

By J. P. Tillman

Vou. No. 295647—9/42

Overpayment—\$3520.52

Appn. Symbol(s): 211/20907

Refer to File No. T-6AO—295647—9/42 J P T

SIRS:

In the audit of your bill described above, an overpayment has been noted as explained below.

Pursuant to Sec. 322 of the Transportation Act, 1940, 54 Stat. 955, a deduction will be made from an amount otherwise due your company unless the amount thus overpaid is refunded within sixty (60) days,—check to be made payable to "The United States" and mailed direct to this office.) [Matter in parentheses stricken through.]

Return one copy of this form with your remittance.

Respectfully, D. Neumann, Chief, Claims Division.
By L. E. Noe, Chief of Section.

Exception(s):

Reference is made to reply to exception dated May 8, 1944 and contents thereof have been noted.

Comptroller General's Decision B 24613 has no bearing on subject case, however Comptroller General's Decision B-30846, Dec. 15, 1942 addressed to Bull Insular Line, Inc., Pier 45, Pratt Street, Baltimore, Maryland covers shipments lost thru enemy action.

Suspension is therefore continued without modification.

J. S. T.

AHE

(Here follow 2 photolithographs, side folios 23, 23a)

ADMINISTRATIVE DIRECTIONS

1. Government property will be transported on the prescribed form of Government bill of lading (original, memorandum, and shipping order), which will be identified by serial numbers.

2. Through bills of lading will be issued in all instances between initial and ultimate points, except when rates more advantageous to the Government may be otherwise secured.

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Public property may be delivered by any Government officer or agent to the Quartermaster Corps, U. S. Army, which will ship the same under its regulations. (28 Stat. 111.)

6. Bills of lading must describe shipments of articles by their commercial names, giving separately such weights, dimensions, and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery in case of loss or damage.

7. If the number of articles to be shipped be too great for the blank form (original, memorandum, and shipping order), extra sheets of the prescribed form should be used, and so attached and designated as to form but one bill of lading, under one number.

8. A voucher when submitted for settlement shall cover charges to one office or service only. The name of the office is inserted at the top of the bill of lading. Correspondence regarding transportation accounts shall be addressed to the particular office or service and references made to the serial numbers of the Government bills of lading included in the company's bill.

(23a)
(68B)

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than would be charged had the shipment been made upon the uniform straight bill of lading or uniform express receipt.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

6. Receipt of the shipment is made subject to the "Report of Loss, Damage, or Shrinkage" noted hereon.

7. In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carriers or to period within which claim therefor shall be made or suit instituted.

INSTRUCTIONS

1. Erasures, interlineations, or alterations in bills of lading must be authenticated and explained by the person making them.

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

3. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading," on the standard form prescribed therefor which, when finally consummated by acknowledgment of the "Certificate and Waiver by Transportation Company," shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.

5. To insure prompt delivery of property, in the absence of the bill of lading, the consignee should give to the carrier a "Temporary Receipt," executed on the prescribed form, for the property actually delivered. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be indorsed with reference to the bill of lading or certificate sufficient to identify the same, and both papers attached and forwarded with the claim for payment thereon.

6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

7. Bills must be submitted by the general officers of carriers, and on forms furnished by the Government, to be obtained from the Public Printer, Washington, D. C.

[fol.24a]

PLAINTIFF'S EXHIBIT 10

Alcoa Steamship Company's Regular Form Bill of Lading

Pursuant to stipulation clauses 3, 6 and 30 only are printed.

"3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise, occasioned by war, rebellion, riots, strikes, stoppage of labor, lockouts or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather, ice; or any conditions, whether or not of a like kind to those herein stated, not shown due to Carrier's fault; and notice to shipper or others of any danger of such delay or default is hereby waived; and the Carrier shall not be responsible for any such delay or default; and if loading of the Goods in the customary manner is delayed, or the Vessel is likely to be detained she may proceed without loading or completing the loading of the Goods."

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"6. Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to Alcoa Steamship Company, Inc. as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully [fol. 25a] earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost, or if the voyage be broken up; and the same shall be payable in lawful money of the United States; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); and said lien shall not be waived even though the goods are delivered to carrier, or landed on the pier, or placed in storage; and

in case of loss of any part of the Goods, the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered. Full freight shall be payable on damaged and unsound goods. The Carrier may collect freight on bill of lading weight, measurement or quantity, and, if gross weight, measurement or quantity delivered exceeds weight, measure or quantity on which freight may be computed, the Carrier may collect freight on such excess, unless shown to have been caused by absorption of water during the voyage. Any error in freight or other charges or in the classification herein of the Goods is subject to correction, and if on correction the freight or charges are higher, the Carrier may collect the additional amount. Should a package consist of several parcels for more than one person, full freight shall be paid on the parcels for each person as if shipped and consigned as a separate package. If there be an enforced interruption or abandonment of the voyage at a port of distress or elsewhere and the Goods or any part be forwarded, the cost thereof, including extra compensation [fol. 26a] if performed by vessels in the service of the Carrier, shall be paid by shipper, consignee and/or assigns."

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"30. It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparation for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or otherwise, interference or hostilities on the part of any Power and of all consequence thereof and the vessel shall have liberty in the discretion of the master, owner or any agent or charterer thereof to proceed notwithstanding any such risks; also, if deemed advisable in the judgment of such master, owner or agent or charterer, in order to avoid loss, damage, delay, expense, or other disadvantage or danger to vessel, cargo, passengers or other interest, to wait at the port of shipment or elsewhere and/or, either with or without proceeding to or toward the port of discharge, or entering or attempting to

enter or discharge the goods there and whether such proceeding, entry or discharge be permitted or not, to proceed to or toward any other port or ports in or not in any route to destination and/or return to the port of shipment once or oftener, backwards or forwards in or not in any order of rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at port of shipment or discharge or elsewhere at the first or any subsequent call, and shall thereupon be relieved of all responsibility in respect thereof, and full bill of lading freight, extra compensation for any additional service [fol. 27a] ice and any extra expense occasioned thereby shall be paid by shipper, consignee and/or assigns, and shall constitute a lien on the goods. The ship is free to carry contraband, explosives, munitions, war-like stores and may sail armed or unarmed, and with or without convoy. The carrier and master shall further be entitled to take such measures to lessen or avoid detention by belligerents, the risk of hostile attack, or other war dangers, as may be deemed appropriate, including the non-observance of any practices, rules or regulations, statutory or otherwise, which might be applicable in times of peace. In case the shipment listed in this bill of lading is seized, or threatened with seizure, by any belligerent, the carrier, for the purpose of avoiding loss, delay or detention to ship and/or cargo, may make such agreements as, in its sole discretion, are deemed prudent with the said belligerent with respect thereto."

(Here follow 2 photolithographs, side folios 28, 29)

PLAINTIFF'S EXHIBIT 11

U.S. GOVERNMENT
PROPERTY

FINDING OFFICER

Transportation Branch

WE-310320

NWL-310320

Rm. 411-1-1-1-1-1-1

U.S. Engineer Office, Mobile District, Mobile, Ala.

No. 411-1-1-1-1-1-1

U. S. Engineer Office, Mobile District, Mobile, Ala.

D. Gullatt, Col., Corps of Engineers

June 13, 1942

GOVERNMENT BILL
OF LADING

ORIGINAL

Received from District Engineer, Mobile District, Mobile, Alabama

by the Alcoa Steamship Company, Inc.

the public property hereinafter described, in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof,

from Mobile, Alabama to Port of Spain, Trinidad

by the said company and connecting lines, there to be delivered in like good order and condition to The District Engineer,

U. S. Engineer Office, Port of Spain, Trinidad For: Walsh-Driscoll Company

via S/S GUNVOR, Voyage 37

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. A valid trade or industrial name)	GROSS FEM	NET FEM
Ship to:			DRESSED YELLOW PINE		
The District Engineer		1,822 pcs.	2 x 4 - 12 - 20 R/L	20,620	
U. S. Engineer Office		1,196 "	2 x 4 - 12	9,568	
Port of Spain, Trinidad		900 "	2 x 4 - 14	8,400	
		645 "	2 x 4 - 16	6,880	
For: Walsh-Driscoll Co.		493 "	2 x 4 - 20	6,573	
WT.NO.W-958-eng-51		346 "	2 x 6 - 12 - 20 R/L	4,974	
		1,901 "	2 x 6 - 16	30,416	
MILITARY		94 "	2 x 8 - 12	1,504	
U.S. GOVERNMENT PROPERTY		82 "	2 x 8 - 16	1,749	
		340 "	2 x 8 - 20	9,067	
itencilled: WC-3565		42 "	2 x 12 - 12	1,008	

(Observe strictly carrier's freight classification. A valid trade or industrial name)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. A valid trade or industrial name)	GROSS FEM	NET FEM
Ship to:			DRESSED YELLOW PINE		
The District Engineer		1,822 pcs.	2 x 4 - 12 - 20 R/L	20,620	
U. S. Engineer Office		1,196 "	2 x 4 - 12	9,568	
Port of Spain, Trinidad		900 "	2 x 4 - 14	8,400	
		645 "	2 x 4 - 16	6,880	
For: Walsh-Driscoll Co.		493 "	2 x 4 - 20	6,573	
WT.NO.W-958-eng-51		346 "	2 x 6 - 12 - 20 R/L	4,974	
		1,901 "	2 x 6 - 16	30,416	
MILITARY		94 "	2 x 8 - 12	1,504	
U.S. GOVERNMENT PROPERTY		82 "	2 x 8 - 16	1,749	
		340 "	2 x 8 - 20	9,067	
itencilled: WC-3565		42 "	2 x 12 - 12	1,008	
		21,035 "	1 x 4 and 6	92,015	
		28,896 "		193,774 FEM	

Ocean Freight - \$3520.52

Freight payable on 135,642 FEM

Pick-up service at origin was not by the Government.

None car ordered ft. Also car furnished.

A. Information

Initials

Car No.

TARIFF AUTHORITY
(To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT

ALCOA STEAMSHIP COMPANY, INC.

(Name of transportation company)

June 13th

1942

For

[Signature]

CERTIFICATE OF ISSUING OFFICER

(To be filled out when this bill of lading is issued for use by contractor in making shipment)

Contract No. W-958-eng-51 or Purchase Order No.

Mobile, Alabama

(If it is paid in advance)

(Contractor's rights to shipping charges not affected by this bill of lading)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from ("G.S. 'Gunvor' has been lost due to enemy action.")

the public property described in this bill of lading. Delivery service at destination was not by the Government.

Weight (In words) For the District Engineer, [Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[Signature] August 8, 1942

[fol. 30a]

DEFENDANT'S EXHIBIT "A"

(Affidavit)

STATE OF NEW YORK,

County of New York, ss.:

WILLIS H. SWARTOUT being duly sworn, deposes and says:

That he prepared a Standard Form Public Voucher covering freight charges with respect to the following shipment:

Government Bill of Lading No.	We-310320
Carrier Bill of Lading No.	M-2209
Vessel	SS Gunvor
Voyage No.	Thirty-Seven (37)
Consignee	Dist. Engr., U. S. Engr. Office, Port of Spain, Trinidad For: Walsh- Driscoll
Amount of Freight	\$3520.52
Carrier's Invoice No.	G-1247
Port of Loading	Mobile, Ala.
Port of Destination	Port of Spain, Trinidad
Sailing Date	June 11, 1942.
Date Vessel Lost	June 14, 1942.

[fol. 31a] That the merchandise included in this bill of lading was delivered to the carrier, and was on board when the vessel was lost by enemy action;

That an original bill of lading covering this merchandise was signed by the steamship company, but has not been accomplished by consignee for the reason that the vessel was lost by enemy action while en route to destination;

That a photostatic copy of this bill of lading is attached hereto, nor accomplished bill of lading available for the reason as stated above;

That paragraph 6 of the carrier's commercial form of bill of lading provides in substance that full freight to destination, whether intended to be prepaid or collected at destination, is due and payable to the carrier as soon as the goods are received for the purpose of transportation, and that the same is deemed fully earned and due and payable before or after loading, goods or vessel lost or not lost;

That upon payment of the Public Voucher heretofore submitted and mentioned above, it is hereby agreed that in the event the original bill of lading is recovered, such bill of lading will be forwarded to the War Department, Finance Office, Washington, D. C. [fol. 32] and no further claim will be made for transportation charges thereon.

Willis H. Swartout, Chief Billing Clerk.

Subscribed and sworn to before me this 15th day of August, 1942. Edwin J. Maas, Notary Public, Queens Co. Clk. No. 1169, Reg. No. 5298, N. Y. Co. Clk. No. 19, Reg. No. 3-M-22. Commission expires March 30, 1943.

(Here follow 2 photolithographs, side folios 33, 33a)

74A

I certify that the above services were rendered as stated, and that they were necessary for the public service.

Approved for 0

(When original only)

1. *James O. Kinsley*

This *Traveling* *U.S.A.*

Paid by Check No. *100594*, dated *SEP 18 1948*

100594

INSTRUCTIONS TO CARRIERS

1. Payment for transportation of property, by freight or express, unless otherwise provided, will be made to the delivering carrier upon this voucher form, accompanied by the corresponding bills of lading, properly accepted; and, where land-grant deductions are involved, the basis or formula of arriving at the net amount claimed should be shown on the face of the voucher, unless this information has been furnished in connection with previous bills, in which case the basis or formula may be omitted until the basis is changed.

2. This form will be used for rendering bills for services performed over either land-grant or non-land-grant lines, but "Net rate" column need not be filled in except when land-grant or other allowances are deducted from gross rate. Bills involving land-grant deductions must not be rendered on the same voucher with those involving no land-grant deduction.

3. Transportation companies when billing on this form are requested to indicate on accompanying bills of lading, opposite each item, the class or commodity rate applied and refer to the tariffs and percentage sheets used. When payment is demanded for a full railroad or truck, the designation of the car by name and number should be shown, with the items included in each carload. When payment is demanded for service in a particular car or kind of car, the authority for use of such car should be shown.

4. Under caption "Rate" the commercial rate always should be shown in "Gross" column and when land-grant is involved, the net rate, arrived at by making proper land-grant deduction, should be shown in "Net" column. If for any reason it is impracticable for carriers to compute a net rate, the gross rate only will be shown and the net charges extended in "Amount" column but the formula used for arriving at the net charge should be shown on the face of the bill.

5. When additional charges, such as loading, wharfage, tolls, etc., are made a part of this account, they must be stated on separate lines, and if paid to other firm or corporation, to be designated by receipt.

6. Payment for transportation charge will be made only for the quantity of goods delivered at destination, except that in case of loss of weight from natural shrinkage on route and weight original, as shown by bill of lading, will be paid for, provided packages are delivered intact. Loss of damage for which a carrier is responsible will be deducted in making settlements for the service.

7. Accounts will be rendered separately for each bureau, office, or service of the respective Government departments and independent establishments, furnishing copies as required by each, as follows:

The Alaska Railroad and the Reclamation Service of the Department of the Interior, the Navy Department, the Bureau of Public Roads of the Department of Agriculture, the U. S. Maritime Commission, the Panama Canal, the Smithsonian Institution, the United States Customs (U. S. and Germany), and the Philippine China Commission require two memorandum copies of the voucher to accompany it.

The Tennessee Valley Authority requires the original and three memorandum copies of the voucher.

All the other bureaus or offices of the Government require the original and one memorandum copy of the voucher.

8. The voucher forms will be printed and distributed by the Government Printing Office, Washington, D. C. Transportation companies should make requisitions on the Public Printer, Government Printing Office, Washington, D. C., for as many copies as may be required.

9. Where more than one sheet is required for the statement of a bill, Carrier will use the "First and Follow Sheet," Form No. 10094.

10. When "First and Follow Sheets" are used, notation as to number of sheets that constitute the voucher should be entered in space provided therefor.

7. Accounts will be rendered separately for each bureau, office, or service of the respective Government departments and independent establishments, furnishing copies as required by each, as follows:

The Alaska Railroad and the Reclamation Service of the Department of the Interior, the Navy Department, the Bureau of Public Roads of the Department of Agriculture, the U. S. Maritime Commission, the Panama Canal, the Smithsonian Institution, the United States Customs (U. S. and Germany), and the Philippine China Commission require two memorandum copies of the voucher to accompany it.

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10. When "First and Follow Sheets" are used, notation as to number of sheets that constitute the voucher should be entered in space provided therefor.

[fol: 34] IN UNITED STATES COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached volume of copies of exhibits was used on the argument of the above entitled case in this Court.

Alexander M. Bell, Clerk. (Seal).

Dated July 22, 1949.

(4734)